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(63 AND 64 VICTORIA, CHAPTER 51)

BY

JOSEPH BRIDGES MATTHEWS,

OF THE MIDDLE TEMPLE AND OF THE OXFORD CIRCUIT, BARRISTER-AT-LAW;

AND

GEORGE FREDERICK SPEAR,

OF THE INNER TEMPLE AND OF THE WESTERN CIRCUIT, BARRISTER-AT-LAW, M.A.

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"The greediness of gain is the only principle on which a stranger can be induced to furnish a stranger."—*Ib.*

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OF USURY.

Usury is conceded on account of the hardness of a man's heart: For since there must be borrowing and lending, and men are so hard of heart, as they will not lend freely, usury must be permitted. It is good to set before us the incommodities and commodities of usury; that the good may be either weighed out, or culled out; and warily to provide, that while we make forth to that which is better, we meet not with that which is worse. The discommodities of usury are . . . that it makes poor merchants. For as a farmer cannot husband his ground so well if he sit at a great rent: so the merchant cannot drive his trade so well if he sit at great usury . . . . It is the canker and ruin of many men's estates.

The commodities of usury are . . . First, that howsoever usury in some respect hindereth merchandising, yet in some other it advanceth it. . . . The second is that, were it not for this easie borrowing upon interest, men's necessities would draw upon them a most sudden undoing: in that they would be forced to sell their meanes (be it land or goods) far under foot: and so, whereas usury doth but gnaw upon them, bad markets would swallow them up. . . . The third and last is that it is a vanitie to conceive that there would be ordinary borrowing without profit: and it is impossible to conceive the number of inconveniences that will ensue if borrowing be cramped. . . . It appears by the ballance of commodities and discommodities of usury, two things are to be reconciled:—The one, THAT THE TOOTH OF USURY BE GRINDED, THAT IT BITE NOT TOO MUCH: *The other, that there be left open a meanes to invite moneyed men to lend to the merchants, for the continuing and quickening of trade.*

BACON'S ESSAY, "OF USURY."

PREFACE.

MANY things have happened since "The Law of Money-lending, Past and Present" was published by one of the present writers. *Bonnard* v. *Dott*, 21 T. L. R. 491, has been affirmed by the Court of Appeal, [1906] 1 Ch. 740, and has established the rule that violation of the provisions of the Act requiring the money-lender to register himself will vitiate the transaction.

Saunders v. *Newbold*, [1905] 1 Ch. 260, has been taken to the House of Lords, [1906] A. C. 461, *sub nom. Samuel* v. *Newbold*, where pronouncements of the first importance were made by the noble and learned Lords who addressed the House, the most important of such pronouncements being to the effect that excessive interest alone *may* (not *must*) render a transaction harsh and unconscionable; to this extent overruling the judgment of Mr. Justice CHANNELL in *Carringtons, Ld.* v. *Smith*, [1906] 1 K. B. 79.

Staffordshire Financial Co. v. *Hunt, The Times*, 10th December, 1907, [1907] W. N. 258, and *In re a Debtor, Ex parte Carden*, 52 Sol. Journal, 209, have demonstrated the danger incurred by a registered money-lender who transacts the business of a loan at a place other than his registered

address, the transactions in both these cases having been held void for non-compliance with the provisions of sect. 2, sub-sect. 1.

Mr. Justice PARKER, in *Lodge* v. *National Union Investment Co., Ld.*, [1907] 1 Ch. 300, has held that although a transaction may be void for non-compliance with the provisions of the Act, yet the maxim, "He who seeks equity must do equity," may oblige a borrower, seeking equitable relief, to repay the money borrowed with interest at 5 per cent.

And last but not least in importance, the judgment of the Lords in *Samuel* v. *Newbold* has been considered by the Court of Appeal in *Fieldings* v. *Pawson* and *Blair* v. *Buckworth*, with the result endeavoured to be stated by the writers in the notes to sect. 1, sub-sect. 1 of the Act. These decisions are concerned with the effect of "excessive interest," as shifting upon the money-lender the burden of proving that the transaction was not harsh and unconscionable; in defining "excessive interest" for this purpose; and in establishing the principle that a transaction may be relievable against as harsh and unconscionable notwithstanding that the borrower was a competent borrower (*a*) who thoroughly understood and appreciated the terms of the bargain.

The above decisions, together with many others upon points of less importance, have rendered the second part of "The Law of Money-lending, Past

(*a*) For a definition of this term, see page 12.

and Present" entirely out of date, and have imperatively called for another work in the nature of a new edition of Part II. of that work. We have endeavoured to collect all the authorities to date, and we have also ventured to discuss questions which have arisen in practice, or which have occurred to us as likely to arise hereafter, upon which no authority as yet is to be found; and to submit our views thereon to the judgment of the profession.

The observations made by the author of "The Law of Money-lending, Past and Present," at pages 64 and 65 of that work, as to the unreasonableness of charging, in respect of renewals, interest at as high a rate as might fairly be charged upon original transactions, do not appear to have been accepted by the Bench, and they have met with some unfavourable criticism from members of the Bar and others, for whose opinions we entertain respect; and, whilst the author's views upon the subject remain unchanged, it has been thought better in the present work to relegate them to a footnote.

We have noticed with regret that the reporters seem to have made up their minds that cases under this Act turn so much upon their special circumstances that, generally speaking, it is not worth while to report them, with the result that the case of *The Staffordshire Financial Co.* v. *Hunt* is only to be found in the Weekly Notes, and *Fieldings* v. *Pawson*, a case of the first importance

decided by the Court of Appeal, has not been reported at all!

An important question, upon which at present no authority exists, will probably arise for settlement in the not far distant future. It is: Does the Act require the lender to be the real owner of the money which he lends? This subject is discussed in the notes to sect. 2.

In conclusion, we venture to express the hope that this work may meet with as favourable a reception at the hands of the profession as "The Law of Money-lending, Past and Present," to the second part of which this work is designed to serve as a new edition.

J. B. MATTHEWS,
G. F. SPEAR.

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August, 1908.

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THE LAW OF MONEY-LENDING.

THE MONEY-LENDERS ACT, 1900.

(63 & 64 Vict. c. 51.)

An Act to amend the Law with respect to Persons carrying on business as Money-lenders.

[8th August, 1900.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Re-opening of transactions of money-lender.

1.—(1) Where proceedings are taken in any court by a money-lender for the recovery of any money lent after the commencement of this Act, or the enforcement of any agreement or security made or taken after the commencement of this Act, in respect of money lent either before or after the commencement of this Act, and there is evidence which satisfies the court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges, are excessive, and that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a court of equity would

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give relief, the court may re-open the transaction, and take an account between the money-lender and the person sued, and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, re-open any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of such principal, interest and charges, as the court, having regard to the risk and all the circumstances, may adjudge to be reasonable; and if any such excess has been paid, or allowed in account, by the debtor, may order the creditor to repay it; and may set aside, either wholly or in part, or revise, or alter, any security given or agreement made in respect of money lent by the money-lender, and if the money-lender has parted with the security may order him to indemnify the borrower or other person sued.

OF THE GENERAL SCOPE AND POLICY OF THE ACT.

In *Wilton* v. *Osborne* (*a*), which was the first reported case decided under the Act, RIDLEY, J., after consultation with several other Judges (*b*), held that in order to entitle the borrower to relief it was necessary that the transaction should be such that a Court of Equity would relieve against it on the ground of its being harsh and unconscionable. This result was arrived at by construing the words "harsh and unconscionable" as expressive of the grounds upon which Courts of Equity before the Act

(*a*) [1901] 2 K. B. 110.

(*b*) So stated by CHANNELL, J., in *Barnett* v. *Corunna*, *The Times*, 16th June, 1902.

would have granted relief, and by reading the words "or otherwise such that a Court of Equity would give relief" as merely added in order to give completeness to the definition.

CHANNELL, J., agreed with this view (*c*) and decided accordingly the unreported case of *Barnett* v. *Corunna*, already referred to in note (*b*).

This view of the Act, however, did not commend itself to the Court of Appeal, which in *In re a Debtor* (*d*) overruled *Wilton* v. *Osborne*, and laid it down that under this Act a transaction with a money-lender can be re-opened when the Court is satisfied that the transaction is "harsh and unconscionable," even though it is not such as a Court of Equity would have given relief against before the Act.

This decision was approved by the House of Lords in *Samuel* v. *Newbold* (*e*), where Lord MACNAGHTEN said:—

> "It seems to me that there are two cases contemplated by the Act: one where the interest is excessive and the transaction harsh and unconscionable, the other where the interest is excessive and the transaction is such that, without the necessity of proving the transaction to be harsh and unconscionable—without going into that question at all—a Court of Equity would give relief. It seems to me those two cases are meant to be distinct."

In the same case the policy and objects of the Act were stated (*f*) by Lord LOREBURN, L.C., as follows:—

> "It seems to me the policy of this Act was to enable the Court to prevent oppression, leaving it in the discretion of the Court to weigh each case upon its own merits, and

(*c*) See judgment of this learned Judge in *Carrington* v. *Smith*, [1906] 1 K. B. 79. It would seem that the intention of Parliament was in accordance with the view of RIDLEY, J., and CHANNELL, J. See Hansard, 4th Series, Vol. 87, pp. 271, 283.

(*d*) [1903] 1 K. B. 705.

(*e*) [1906] A. C. 461.

(*f*) At p. 467.

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to look behind a class of contract which peculiarly lend themselves to an abuse of power."

Lord JAMES in the same case said (*g*) :—

"Now the objects of the Act can easily be traced from its contents. The ends sought to be remedied by it were generally recognised. A class of men well known under the term 'money-lender' were, under different names and disguises, carrying on the business of lending money.

"No usury law remained to restrain them, and so in many instances they lent money at as high a rate of interest as could be wrung from the necessities of the borrower. Terms were imposed which caused default, however technical, to add to the burthen to be borne by the debtor. No sufficient legal remedy existed. The old Chancery jurisdiction was too narrow to meet the case. It was not with remaindermen and reversioners that the modern money-lender dealt. The needy, helpless, perhaps unwary, borrower was of a different class to those who had in former days applied to the Court of Chancery for relief. It was principally in the County Courts the money-lender sought to enforce his contract, and those Courts had no power to grant direct relief against oppressive contracts. True it was that humane Judges would sometimes mark their sense of the unsatisfactory state of the law by minimising the payments to be made to such an extent that many judgments given in accordance with the existing law became nugatory in their effect. To remedy such evils by affording sufficient legal protection against them the Legislature was moved to action."

Later on in his speech (*h*) Lord JAMES thus summarised the result he had arrived at:—

"Excessive interest of itself is sufficient to render a transaction harsh and unconscionable. Proof of excessive interest may of itself, therefore, be sufficient to entitle

(*g*) At p. 471.
(*h*) At p. 473.

the debtor to relief. What amounts to excessive interest is to be determined by the tribunal in each case, the question of risk being a material matter for consideration. When excessive interest is apparently established, any facts which tend to show that such excess does not prove the contract 'harsh and unconscionable' should be proved in evidence by the lender. The burthen is on him."

Lord ALVERSTONE, C.J., in *Blair* v. *Buckworth* (*i*) said that in his opinion the Act was intended to protect borrowers against themselves; and in the same case FARWELL, L.J., said :—

"The Act said nothing about the knowledge of the borrower as to what the terms were. The fact that the borrower knew all about the transaction was only one element to be taken into consideration in seeing whether the transaction was harsh and unconscionable."

It is submitted that *Samuel* v. *Newbold*, as interpreted by the Court of Appeal in *Blair* v. *Buckworth*, and *Fieldings* v. *Pawson* (*j*) must be taken to have established the following propositions :—

PROP. I.—That excessive interest alone may be sufficient to condemn a transaction as harsh and unconscionable.

PROP. II.—That where in the opinion of the Judge the interest is *primâ facie* excessive, having regard to the risk, and to all the circumstances of the case, the burden of proof shifts on to the money-lender to prove that the transaction was not harsh and unconscionable.

PROP. III.—That whilst the borrower's competence, and his understanding and appreciation of the risk, must always be of great importance in considering whether the transaction is harsh and unconscionable, yet, where the interest charged is grossly excessive, the money-lender will not discharge the burden of proof which is shifted upon him under Proposition II. by merely proving that

(*i*) 24 T. L. R. 474.
(*j*) App. G.

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the borrower was a competent borrower (*k*), and that he fully understood and appreciated the transaction.

In some of the cases which were decided after *Samuel* v. *Newbold*, but before *Blair* v. *Buckworth* and *Fieldings* v. *Pawson*, the effect of *Samuel* v. *Newbold*, as interpreted in the two last mentioned cases, and as endeavoured to be stated in the above Propositions numbered respectively II. and III., would seem not to have been fully appreciated.

EXCESSIVE INTEREST: WHAT IT IS, AND ITS RELATION TO THE WORDS "HARSH AND UNCONSCIONABLE."

The difficulty of deciding whether, in any given case, the interest charged is excessive, has been acutely felt by all the Judges who have had to deal with the question. "Excessive," of course, means in excess of that which, under all the circumstances of the case, and having regard to the risk, the money-lender would, in the opinion of the Judge, have been justified in charging. But the difficulty is created by the fact that the Act affords no guide, and, as CHANNELL, J., pointed out in *Carringtons, Ld.* v. *Smith* (*l*), "whilst there is something like a market rate for loans on security, there cannot be any rate, ordinary or extraordinary, for loans on a promissory note without security. There can be no standard rate on personal loans." Still, difficult as it may be to discharge the task at all, and impossible as it may be to discharge it in a satisfactory manner, the task of deciding whether the interest charged is "excessive," has been imposed by the Legislature upon the Judges, who have to make up their minds upon the matter, in the cases which come before them, and do the best they can. The question whether the rate of interest charged is "excessive" is not to be answered

(*k*) For a definition of this term, see p. 12, *post*, p. 12.
(*l*) [1906] 1 K. B. 90, 91.

solely by reference to the risk run by the money-lender. The Court is to have regard to the risk and to all the circumstances of the case.

One might have been excused for falling into the error of thinking that the rate of interest charged would have related solely to the risk run, and that other circumstances (*e.g.*, that the borrower was a competent borrower who fully understood and appreciated the bargain), however relevant to the question whether the transaction was harsh and unconscionable, could have no bearing upon the question whether the rate of interest charged was excessive. But the language of the Act requires that the circumstances of the case are to be had regard to in this connection. Sect. 1 (1) says that the Court may "relieve the person sued from payment of any sum in excess of the sum adjudged by the Court to be fairly due in respect of such principal, interest and charges, as the Court, *having regard to the risk and all the circumstances may adjudge to be reasonable.*"

The following passage from the judgment of CHANNELL, J., in *Carringtons, Ld.* v. *Smith* (*m*) deals with this point:—

> "'Harsh and unconscionable' are not easy words to construe when the rules of the Court of Equity have been put out of consideration, but they are, at any rate, used to describe some conduct of the money-lender, and it may be easy enough in many cases to say whether or not his conduct can be fairly described by these epithets. There is a much greater difficulty as it seems to me in the word 'excessive.' It is a relative word — exceeding what? Interest is nothing but the sum to be paid for the use of money for a certain time, and the value of a loan of money, as of everything else, is what it will fetch. The usury laws have been done away with, and the

(*m*) These remarks of the learned Judge must be read subject to the rule now established as to the shifting of the burden of proof when the interest charged is excessive.

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Legislature seems to have intentionally avoided re-enacting them and telling us what is to be the maximum of lawful interest. There are, however, some words further on in the section which I think are a guide to the meaning of the Legislature in the use of the word 'excessive.' If the transaction is re-opened the Court may 'relieve the person sued from payment of any sum in excess of such interest as the Court, having regard to the risk and all the circumstances (*n*) may adjudge to be reasonable.' It seems, therefore, that the Court is to make an adjudication as to what interest 'having regard to the risk and all the circumstances,' is reasonable; and if the interest charged is in excess of that amount it seems that it is 'excessive' within the meaning of that word as used earlier in the section. This task would often be a difficult one, but amongst 'all the circumstances' which the Court is to take into consideration, surely the fact that the borrower has thoroughly understood the transaction and, knowing all the facts much better than the Court can possibly do, has been quite willing to pay the interest asked, is one of the circumstances which the Court must consider (*o*). Often the Court will not have that circumstance to guide it. The borrower is frequently ignorant, sometimes imposed upon; frequently in such straits that he has no alternative, but must take the money on the only terms he can get it. In those cases the man's agreement to pay the interest asked can be of no real guide to the Court."

In the case just cited the borrower was a man of business of mature years, a director of a company, in receipt of an income of 1,000*l.* a year, which was derived, however, to some extent from commissions, having a house of furniture worth, according to his own testimony, 3,000*l.*, and pictures worth 6,000*l.* At the time when he borrowed

(*n*) See per Lord JAMES OF HEREFORD in *Samuel* v. *Newbold*, [1906] A. C. at p. 473; and FARWELL, L.J., in *Fieldings* v. *Pawson*, App. G., passage cited *post*, p. 18.

(*o*) This is now agreed on all hands.

the money he was owing about 150*l.* His creditors were pressing him for payment, but had not put their demands in suit against him. He was anxious to pay them off, and borrowed 150*l.* at the rate of 75*l.* per cent. per annum. CHANNELL, J., whilst holding that the money-lender had not run any substantial risk, refused relief chiefly upon the ground that the borrower fully understood and appreciated the transaction, and that the bargain was a fair and open one.

Upon reference to *Samuel* v. *Burton* (*p*) it will be seen that STIRLING and MATHEW, L.JJ., affirming BIGHAM, J., refused relief in a case where the rate of interest charged was stated to be 80 per cent. per annum, but where "the borrower knew perfectly well what he got, and what he was going to pay."

STIRLING, L.J., said :—

> "The borrower knew perfectly well what he got, and what he was going to pay. It was put to him in the clearest form, and although he may not have appreciated the rate per cent., still he was a man of business, and he might very well have ascertained, but he did not choose to ascertain. That is all he says. I am not prepared to say that the interest is charged at such an excessive rate that the transaction ought on that ground to be held to be harsh and unconscionable within the meaning of the Act, and that being so, no advantage having been taken of him, he being a man of full age and a man of business, I do not see any more than BIGHAM, J., seems to have done, any ground for giving him relief under the Act."

It may, therefore, it is submitted, be taken upon the authority of these cases, that where the borrower is a competent borrower, and thoroughly understands and appreciates the transaction and there is no circumstance of unfairness entitling him to be relieved, and the utmost

(*p*) App. F.

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that can be urged against the transaction is that the interest agreed to be paid amounts to as much as 80 per cent. per annum, it will not by any means necessarily follow that the borrower will be entitled to relief (*q*).

But, if the rate of interest is *primâ facie* in the opinion of the Judge "excessive," the burden of proof is shifted upon the money-lender to prove that the rate of interest charged was justifiable in the circumstances, and that the transaction is not harsh and unconscionable. The shifting of the burden of proof does not interfere, of course, with the principle that in considering whether the interest is excessive, the risk and all the circumstances of the case must be had regard to.

The question whether the rate of interest is *primâ facie* "excessive" in any given case, so as to shift the burden upon the money-lender of establishing that he was justified in charging interest at so high a rate, and that the transaction was not harsh and unconscionable, cannot be reduced to a rule. The Judge must make up his mind upon the matter in each case according to his appreciation of the risk run by the money-lender and of all the circumstances of the case. It is evident that there must be wide room for differences of judicial temperament and opinion. It is much to be hoped that as time goes on something like uniformity of practice may be evolved.

Meanwhile, Lord ALVERSTONE, C.J., in *Fieldings* v. *Pawson* (*r*), has expressed an opinion which doubtless will receive respectful consideration at the hands of any

(*q*) It will be observed that *Samuel* v. *Burton* is nowise in conflict with Lord ALVERSTONE'S rule in *Fieldings* v. *Pawson*. If the view is taken that the rate of 80 per cent. did not approximate to 100 per cent. then Lord ALVERSTONE'S rule in *Fieldings* v. *Pawson* did not apply. If the view is taken that the interest did approximate to 100 per cent. then the case must be taken to be an instance of a case where the money-lender discharged the burden of proof.

(*r*) App. G.

Judge who may be called upon to deal with any case in which relief is claimed under the Act.

The LORD CHIEF JUSTICE said:—

> "I think that each particular case must depend upon its particular facts; but I should certainly be disposed to say that in the absence of admitted facts, or proof that there are circumstances which tend to a very high rate of interest, *it does lie upon the money-lender to give some explanation of rates of interest which are at or about* 100 *per cent.*"

Now that it has been established by the decision of the House of Lords in *Samuel* v. *Newbold* (*s*) that the harshness and unconscionableness of a transaction may be established as an inference from the excess of interest alone, without any other circumstance, and now that it has been further established that when the rate of interest is "excessive" the burden of proof is shifted upon the money-lender to establish the righteousness of the transaction, it becomes evident that as the rate of interest rises above this turning point (whether "at or about 100 per cent." or whatever point the Judge may fix) it must tend to overshadow the consideration that the borrower, being a competent borrower, understood and appreciated the bargain, and must tend to reach a point where the excess of interest may be so great as to altogether displace that consideration. Obviously the doctrine of the shifting of the burden of proof (whether Lord ALVERSTONE'S opinion as to the point at which generally speaking it ought to shift should be generally received and acted upon or not) leaves abundant room for the play of judicial discretion in balancing the one consideration against the other. In considering whether, in cases in which the burden of proof is shifted, the money-lender has or has not discharged the burden of

(*s*) [1906] A. C. 461.

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proof thus cast upon him, the circumstance that the borrower, being a competent borrower (*t*) in fact, fully understood and appreciated the bargain, is obviously a circumstance of great weight to be considered, which it may be surmised will probably affect the minds of different Judges to different extents.

In order to appreciate the ruling of the Court of Appeal, and particularly the opinion expressed by the LORD CHIEF JUSTICE in *Fieldings* v. *Pawson* (*u*) it is necessary to go back to the decision of the House of Lords in *Samuel* v. *Newbold*, and, indeed, a little behind it.

When "The Law of Money-lending, Past and Present" was published CHANNELL, J., had just delivered his famous judgment in *Carringtons, Ld.* v. *Smith* (*x*), and *Samuel* v. *Newbold* had not yet been decided by the House of Lords. CHANNELL, J., in his considered judgment in that case, had vigorously maintained the doctrine that in the absence of any other circumstance supporting a claim to relief, the harshness and unconscionableness of a bargain could not be inferred from mere excess of interest. In "The Law of Money-lending, Past and Present," the author (pp. 40 *et seq.*) ventured to express a doubt whether the judgment of CHANNELL, J., could be reconciled with certain *dicta* in the Court of Appeal there cited. This doubt has been fully justified by the decision of the House of Lords in *Samuel* v. *Newbold*. Before, however, passing to the consideration of that case the *dicta* in the Court of Appeal upon which the doubt of the author of the work just referred to was founded may be briefly referred to. They were the following:—

(*t*) We use this expression as conveniently indicating an adult borrower of sufficient intelligence, education, business knowledge, and experience to enable him fully to understand and appreciate the bargain.

(*u*) App. G.

(*x*) [1906] 1 K. B. 79.

In *In re a Debtor* (*y*) COLLINS, M.R., at p. 709, said:—

> "Relief may be given if the bargain is harsh and unconscionable, by reason of excessive interest, or other excessive charges."

and again, later, at the same page:—

> "I will not say that under this section the interest charged and the other charges made might not be so excessive as to render the bargain harsh and unconscionable, even as against a borrower who was of full age, and who stood in no special relation to the lender."

In the same case COZENS-HARDY, L.J., said:—

> "I should be sorry to say that the rate of interest charged and the other charges might not be so excessive as for that reason alone to render the transaction harsh and unconscionable."

In *Wells* v. *Allott* (*z*) COZENS-HARDY, L.J., said:—

> "Where the interest appears on the face of the transaction to be excessive, whether it is 100 per cent. or less, the further inquiry has to be undertaken, namely, whether the interest is so excessive as to make the transaction harsh and unconscionable."

and in *Poncione* v. *Higgins* (*a*), COZENS-HARDY, L.J., said:—

> "It was possible that the transaction might be deemed excessive, and yet the transaction might not be deemed harsh and unconscionable, and it was possible that the interest might be deemed so extravagantly excessive as alone to satisfy the Court that the transaction was harsh and unconscionable."

To these *dicta* the author might have added references

(*y*) [1903] 1 K. B. 705.
(*z*) [1904] 2 K. B. at p. 848.
(*a*) 21 T. L. R. 11.

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to the *dicta* of STIRLING, L.J., and MATHEW, L.J., in *Samuel* v. *Burton* (*b*), which were as follows :—

STIRLING, L.J. :—

> "I am not prepared to say that the interest is charged at such an excessive rate that the transaction ought on that ground to be held to be harsh and unconscionable within the meaning of the Act."

MATHEW, L.J. :—

> "I agree with what the Court of Appeal has said, and I am sure that BIGHAM, J., would agree also, that excessive interest may create a presumption of harsh or unconscionable conduct."

The House of Lords spoke upon this matter with no uncertain voice.

The particular passages in the speeches of their Lordships which deal with excessive interest as sufficiently evidencing the harshness and unconscionableness of the bargain are the following :—

Lord LOREBURN, L.C., at p. 467 :—

> "A transaction may fall within this description" (*i.e.* harsh and unconscionable) "in many ways. It may do so because of the borrower's extreme necessity and helplessness, or because of the relation in which he stands to the lender, or because of his situation in other ways. These are only illustrations, and, as in the case of fraud, it is neither practicable nor expedient to attempt any exhaustive definition. What the Court has to do in such circumstances is, if satisfied that the interest or charges are excessive, to see whether in truth and fact and according to its sense of justice the transaction was harsh and unconscionable. *We are asked to say that an excessive rate of interest could not of itself be evidence that it was so. I do not accept that view. Excess of interest or charges may of itself be such evidence, and particularly if it be unexplained. If*

(*b*) App. F.

no justification be established, the presumption hardens into a certainty (*c*). It seems to me that the policy of the Act was to enable the Courts to weigh each case upon its merits and to look behind a class of contracts which peculiarly lend themselves to an abuse of power."

Lord MACNAGHTEN (at p. 470) :—

"In dealing with the first alternative the Court must be satisfied that the transaction is harsh and unconscionable, that is, as I think the latter part of the section shows, unreasonable, and not in accordance with the rules of fair dealing. The rate of interest may be so monstrous as to show that by itself. There may be, as Lord THURLOW said in one case, 'an inequality so strong, gross, and manifest that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it' (*Gwynne* v. *Heaton*)" (*d*).

Lord JAMES OF HEREFORD (at p. 473) :—

"The result I have arrived at may therefore be summarised as follows:—Excessive interest of itself is sufficient to render a contract harsh and unconscionable. Proof of excessive interest may of itself, therefore, be sufficient to entitle the debtor to relief. What amounts to excessive interest is to be determined by the tribunal in each case, the question of risk being a material matter for consideration (*e*). *When excessive interest is apparently established, any facts that tend to show that such excess does not render the contract 'harsh and unconscionable' should be proved by the lender. The burthen is on him*" (*f*).

(*c*) This is one of the passages upon the strength of which the Court of Appeal, in *Fieldings* v. *Pawson*, founded what they said as to the shifting of the burden of proof.

(*d*) (1778) 1 Bro. C. C. 9. The manner in which FARWELL, L.J., applied this passage in the speech of Lord MACNAGHTEN in *Fieldings* v. *Pawson* has given it an extra keen edge in money-lending cases.

(*e*) The noble and learned Lord is here in accord with CHANNELL, J., as to all the circumstances having to be taken into consideration in considering whether the interest is excessive.

(*f*) This is another of the passages relied upon by the Court of Appeal in *Fieldings* v. *Pawson*.

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In *Wade* v. *Shaffer* (*g*) PARKER, J., said :—

> "*Samuel* v. *Newbold* decided that if, having regard to the circumstances, the Court thought the interest excessive, the *onus* was on the other side (*i.e.* the money-lender) to prove that the transaction was not harsh and unconscionable."

In this case the plaintiff, a music-hall artist, who was earning a large professional income, but was deeply involved with money-lenders, was relieved upon the basis of 25 per cent. per annum (*h*).

In *Fieldings* v. *Pawson* (*i*) the following most important pronouncements were made by the LORD CHIEF JUSTICE and FARWELL, L.J. :—

Lord ALVERSTONE, C.J., said :—

> "The facts are that upon the 16th March, 1907, the defendant, who is appealing, signed a promissory note whereby he undertook to pay 3,650*l.* by two instalments of 1,825*l.* each, on the 16th June and the 16th September, that is at three months and six months, and in the event of the first 1,825*l.* not being paid, the whole 3,650*l.* became payable at once. . . . It is not disputed that the rate of interest, if the instalments were punctually paid, would be 139 per cent., and if the default clause comes into operation it would be 218 per cent. My brother Lord COLERIDGE has thought that there were no circumstances which justified him in re-opening the bargain, or in forcing the money-lender to receive less than he agreed to take. I am unable to concur in that view. I think that having regard to the facts that I will state it was incumbent upon the money-lender to give some explanation of why in such a bargain it was proper for him to charge at the rates I have mentioned, of 139 per cent., and, still more, 218 per cent. in the event of failure to pay by instalments. . . . I am disposed

(*g*) *The Times*, 25th June, 1907.

(*h*) The contract rate of interest relieved against was upwards of 200 per cent. per annum.

(*i*) App. G.

myself to agree that there is no such thing as a standard rate of interest beyond which it must be said that the interest is excessive, and below which it may be said the interest is not excessive. I think that each particular case must depend upon its particular facts; *but I should certainly be disposed to say that in the absence of admitted facts or proof that there are circumstances which tend to a very high rate of interest, it does lie upon the money-lender to give some explanation of rates of interest which are at or about* 100 *per cent.*"

[The LORD CHIEF JUSTICE then referred to the passages from the speeches of Lord LOREBURN, Lord MACNAGHTEN, and Lord JAMES OF HEREFORD, in *Samuel* v. *Newbold*, above set out, and to the *dictum* of COZENS-HARDY, L.J., in *Wells* v. *Allott*, also above quoted, and said that those authorities] "recognise the proposition that if the Court conceives that the interest is excessive an explanation is required to be given by the money-lender to show that the bargain is not harsh and unconscionable upon that ground as upon others."

FARWELL, L.J., said:—

"I agree with the LORD CHIEF JUSTICE that the judgment of Mr. Justice COLERIDGE cannot stand. The Act of Parliament has cast upon the Court the necessity, very much against the will of most of the Judges who have had to deal with the matter, of remodelling the terms which were entered into by persons who are *sui juris* (*k*), and we have to do the best we can. . . . Now we have the guidance of the House of Lords in the last case on the subject (*l*) to tell us that when the Court is dealing with this case of the interest being excessive, and the transaction harsh and unconscionable (the latter part of which means unreasonable, as Lord MACNAGHTEN says, and not in accordance

(*k*) The LORD JUSTICE here used these words in a secondary sense as meaning what we have elsewhere ventured to term "competent borrowers." If a borrower was not *sui juris* in the primary sense of that expression he did not require the Money-lenders Act to relieve him.

(*l*) *Samuel* v. *Newbold*.

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with the ordinary rules of fair dealing), the rate of interest in itself may be sufficient evidence of its being harsh and unconscionable."

[The LORD JUSTICE here quoted the passage from the speech of Lord LOREBURN, L.C., in *Samuel* v. *Newbold*, above set out; and continued:]

"The first question then is:—Is this rate of interest excessive? Here again I have the assistance of Lord MACNAGHTEN. He says that if you find the rate of interest is so monstrous that it is impossible to state it to a man of common sense without producing an exclamation at the inequality of it, that is sufficient to show that the transaction is harsh and unconscionable. It is impossible to say *à priori* what rate of interest is in itself so unconscionable, but I am prepared to say this, that 139 per cent., which is the lower rate here, and 218 per cent., which is the higher rate here, and the one which is actually sought to be enforced (*m*), is so monstrous as to produce an exclamation from the hearer that it cannot have been actually understood, or cannot have been a fair bargain between the parties. If that is so—and that I take to be the meaning of Lord MACNAGHTEN—then the *onus* is cast upon the money-lender of explaining.

"Now what is the meaning of 'excessive'? I take it that we have the explanation in the latter part of sub-section 1 of the first section of the Act, where the Act goes on to explain what the Court has to do when it re-opens the transaction. It has then to give such sum as is fairly due in respect of such principal, interest and charges as the Court, having regard to the risk and all circumstances, may adjudge to be reasonable. Reading that back to the word 'excessive' before, I apprehend that the meaning is, if the rate is in excess of that which is fair, having regard to the risk run and all the circumstances of the case."

[The LORD JUSTICE then dealt with the facts, holding that the money-lender had not discharged the burden of

(*m*) Default had been made in payment of the 1,825*l.* due on the 6th June, and the action was brought to recover the whole 3,650*l.*

proof that the risk run and the circumstances of the case justified the rate of interest charged, and that the interest charged was excessive; and continued :]

"On all these grounds, I am of opinion that we are bound by the decision of the House of Lords to say that this is a monstrous rate of interest, that it is harsh and unconscionable, and that it cannot stand."

In this case the Court relieved the borrower upon the terms that he should pay interest at the rate of 25 per cent. per annum. As to this, however, FARWELL, L.J., said :—

"I confess I should not have been so liberal to the money-lender as the LORD CHIEF JUSTICE. Having regard to the risk and all the circumstances, the risk I have already said, in my view, would be amply met by 10 per cent. as given in the case that went to the House of Lords, *Samuel* v. *Newbold*, but as my Lord thinks that 25 per cent. is a fair rate to allow, having regard not only to the risk, but to all the circumstances, which I suppose must include the fact that the man was exceedingly foolish to put his hand to such a document, I am not prepared to differ from that, the more so as my difference would have no effect on the result" (*n*).

The borrower in this case held a position in a well-known manufacturing establishment at a salary of 500*l.* a year. He was in receipt of an income of 1,200*l.* "from private sources," and he was owing about 500*l.*, 300*l.* of which was owing to a money-lender (not the plaintiffs), in respect of a loan which defendant had raised at a rate of interest somewhat similar to the contract rate of interest. Defendant signed the note as surety for his brother, being induced thereunto by an arrangement which he had made with his brother that he was to receive 400*l.* out of the plaintiffs' advance (*o*).

(*n*) KENNEDY, L.J., dissented from relief being given at all.

(*o*) In order to appreciate the view which FARWELL, L.J., took of the risk, it must be borne in mind that the Court treated the 1,200*l.* a year,

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The following propositions are submitted :—

PROP. I.—A Judge who is called upon to inquire whether the rate of interest charged is "excessive" must first ask himself the following question:—"If I had been called upon when this contract was about to be made to fix the highest rate of interest which, in my opinion, the money-lender could fairly charge, having regard to the apparent risk and to all the circumstances of the case, what rate of interest should I have fixed?" If the interest in fact charged is in excess of that rate, then the interest is "excessive" within the meaning of the Act.

PROP. II.—The finding that the interest charged is "excessive" is in all cases a condition precedent to the exercise of jurisdiction under the Act.

PROP. III.—In order that a transaction may be re-opened, it is necessary, in addition to the Court finding the interest to have been "excessive" as defined by Proposition I., that the Court should go further and find that the transaction was "harsh and unconscionable" ("unconscionable" meaning "unreasonable and not in accordance with the rules of fair dealing").

PROP. IV.—But the harshness and unconscionableness of the transactions may be inferred from the excessive rate of interest charged, without any other circumstance.

PROP. V.—Whenever the interest is, in the opinion of the Judge, "excessive," as defined by Prop. I., then the burden of proof shifts on to the money-lender to satisfy the Judge that, having regard to the risk and to all the circumstances of the case, the transaction was not in fact harsh or unconscionable. If the money-lender fails to discharge this burden, then the Judge, from

as to which the debtor deposed that he was in receipt of it "from private sources," as being an available source upon which the borrower might have raised money by mortgage with or without a policy of insurance on his life. There was no evidence upon this subject beyond the borrower's statement above mentioned, and the burden of proof being upon the money-lender, the available character of the 1,200*l.* a year as a security was presumed against him.

"excessive interest" alone, may, and ought to, draw the inference that the transaction was harsh and unconscionable.

PROP. VI.—In all cases of unsecured loans, the turning point of the burden of proof is certainly reached when the rate of interest charged approximates to 100 per cent. It may, according to the Judge's view of the risk incurred and of the circumstances of the case, be reached at a lower point.

PROP. VII.—Where the rate of interest charged is grossly excessive, it may wholly displace the effect of the circumstances that the borrower was a competent borrower (*p*) who thoroughly understood and appreciated the transaction (*q*).

PROP. VIII.—But, in considering whether the rate of interest is so excessive as to render the transaction harsh and unconscionable, the competence of the borrower and his understanding and appreciation of the terms is a circumstance to which due regard must in all cases be had, and which must always be entitled to great weight.

In considering whether the rate of interest is "excessive," *it is not always a reliable test to take the rate of interest per annum* at which the interest charged works out. In so far as the amount charged represents a sum fairly chargeable by the money-lender as a premium against the risk which he incurs, it is obvious that the risk is incurred once for all immediately he parts with his money. In most cases it depends not at all, or, if at all, only to a slight and indeterminable extent, upon the period agreed upon for the duration of the loan. A loan for a week to a borrower of questionable solvency involves just as much risk of the lender losing his money

(*p*) See this expression defined, *ante*, p. 12.

(*q*) See *Blair* v. *Buckworth*, 24 T. L. R. 474, where FARWELL, L.J., said :—"The Act says nothing about the knowledge of the borrower as to what the terms were. The fact that the borrower knew all about the transaction is only one element to be taken into consideration in seeing whether the transaction is harsh and unconscionable."

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as if the loan were for three or six months. Probably, moreover, no one would exclaim at the inequality of a bargain made upon a loan of 1*l.* for a week that the borrower should repay 1*l.* 1*s.*, and yet, expressed in terms of rate of interest per annum, this represents no less a rate than 260 per cent. per annum. It is submitted, therefore, that the LORD CHIEF JUSTICE'S 100 per cent. rule may be found to be inapplicable to loans of small sums of money for short periods.

The LORD CHIEF JUSTICE himself recognised this distinction in *Blair* v. *Buckworth* (*r*). He there said:—

> "The rate of interest may in certain circumstances be in itself a fallacious test as to whether the transaction was harsh and unconscionable. In many circumstances 1*s.* interest for a week on 1*l.*, or 5*s.* interest on 1*l.* for a short period, though an enormous rate of interest, ought not to be set aside. Each case must be judged by its own particular facts."

It may not be inappropriate to refer in this connection to the scale of charges authorised by statute to be made by pawnbrokers. The scale has no application to loans exceeding 10*l.* in amount; but to loans not exceeding 10*l.* the charges authorised by the schedule to the Pawnbrokers Act are as given below.

It will be observed that if the pledge is redeemed on the very next day after the advance, the pawnbroker is entitled to the full interest for a month. Also it is to be noted that these charges are authorised in cases where it is of the very essence of the transaction that the lender shall be fully secured. Take a loan of 5*l.*:—A loan by a pawnbroker of 5*l.* for one month, or part of one month, carries ½*d.* per 2*s.* 6*d.*, = 4*d.* per 1*l.*, = 1*s.* 8*d.* for 5*l.* Treating the pledge as remaining for the full month this amounts to 20 per cent. per annum. But if the loan is only for one day it works out at no less than 600 per cent.

(*r*) 24 T. L. R. 474.

per annum! In addition to this the pawnbroker is entitled to charge one penny for the ticket (*s*).

The relation of the default clause and of renewals to the question of excessive interest is discussed later.

(*s*) PAWNBROKERS ACT, 1872 (35 & 36 VICT. C. 93).

THE FOURTH SCHEDULE.

Profits and Charges allowed to Pawnbrokers.

PART I.—*Profits on Loans.*

A. On a loan of forty shillings or under—	
For any time during which the pledge remains in pawn not exceeding one month, for every two shillings or fraction of two shillings lent.	One halfpenny.
For every month after the first, including the current month in which the pledge is redeemed, although that month is not expired, for every two shillings or fraction of two shillings lent	One halfpenny.

Provisoes.

1. If the pledge is redeemed before the end of the first fourteen days after the expiration of any month, the pawnbroker shall, in respect of those fourteen days, be entitled to take half the amount which he would be entitled to take for the whole month.

B. On a loan of above forty shillings—	
For every month or part of a month for every sum of two shillings and sixpence or fraction of a sum of two shillings and sixpence . .	One halfpenny.

PART II.—*Charge on Pawn Ticket.*

When the loan is ten shillings or under . .	One halfpenny.
When the loan is above ten shillings . .	One penny.

PART III.—*Charge on Inspection of Sale Book.*

For the inspection of the entry of a sale . .	One penny.

PART IV.—*Charge on Form of Declaration.*

When the loan is five shillings or under . .	One halfpenny.
When the loan is above five shillings . .	One penny.

Rule.

This sum is to be paid by the applicant at the time of application.

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OF THE DISTINCTION BETWEEN UNSECURED AND SECURED LOANS.

The necessity for making this distinction is caused by the difference in character between secured and unsecured loans in regard to the risk run by the lender. The Court, in cases falling within the Act, is empowered "to relieve the person sued from payment of any sum in excess of the sum adjudged by the Court to be fairly due in respect of such principal, interest and charges, as the Court, *having regard to the risk*, and all the circumstances, may adjudge to be reasonable."

As the usury laws did not apply (*t*) where the principal sum was *bonâ fide* hazarded (though the chance that the borrower might not be of ability to pay was not counted as a hazard for the purpose of taking a case out of the Statutes of Usury), so the risk of the borrower's insolvency is directly relevant to the rate of interest which may fairly be exacted for the loan. The value of a security is generally capable of being appraised with more or less approximate accuracy, but the solvency of a borrower, having nothing but his personal security to offer, must always, or at any rate nearly always, be a doubtful question. If Lord MACNAGHTEN gave utterance to a truth when he said that "it is as easy to gauge the solvency of an individual as to estimate the financial ability of a crowd" (*u*), is it not as true to say that it is as easy to estimate the financial ability of a crowd as to gauge the solvency of an individual? Assurances given as to their financial position by men whose occasions are so urgent as to force them to obtain accommodation at ruinously high rates of interest are notoriously unreliable, and the sources of authentic information which are generally open to a money-lender, *e.g.*, the registries of bills of sale and of County Court judgments, if they

(*t*) See Part I. of "The Law of Money-lending, Past and Present."
(*u*) In *Salomon* v. *Salomon*, [1897] A. C. at p. 53.

contain nothing indicative of the borrower's embarrassment, are at best nothing more than purely negative in character.

Secured loans stand upon an altogether different footing from unsecured loans. If the security given is ample and known to be so, and of a kind readily realisable in the open market, anything much over 5*l.* per cent. might very well be considered "excessive," the lenders' risk being practically *nil.* On the other hand, a so-called security may be of such doubtful or contingent value, or so difficult of realisation, or so disproportionate to the amount of the loan, that it may be necessary to treat the loan as being either wholly or in a great measure unsecured. In the latter case it might be found that the proper mode of dealing with the matter would be to treat so much of the loan as was not covered by the security as unsecured, apportioning the agreed interest accordingly, and treating as "excessive" so much of the agreed interest as might be attributable to the secured part of the loan, and as it might be necessary to treat as "excessive," leaving so much as might be attributable to the unsecured part of the loan undisturbed. It is obvious that no more can be done towards laying down a rule for guidance in such cases than to insist upon the distinction between secured and unsecured loans being always kept steadily in view. Between the wholly unsecured loan and the fully and satisfactorily secured loan, there is room for an infinite variety of partially secured loans, and all that can be said is that the Judges before whom claims for relief in respect of such transactions may come must do the best they can to administer a law which leaves the matter so largely to their discretion.

Loans upon the joint or joint and several security of several borrowers, whether such joint borrowers are principals, or as to one or more of them are principals, and as to the other or others of them sureties, fall to be classified as unsecured loans, but, obviously, the circumstance that

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the lender obtains the security of several persons is a circumstance which goes directly to the risk incurred by the money-lender, which is minimised more or less according to the apprehended solvency of the parties, and must therefore be taken into account by the Judge in considering whether the interest charged is "excessive." The circumstance that several persons join in the transaction as borrowers may also sometimes be important upon the question whether they understood and appreciated the transaction, any opportunities which they may have had of discussing the proposed terms between themselves being a circumstance of some importance in this connection.

Where bonus shares taken.

Another case suggested and illustrated by *Bonnard* v. *Dott* (*x*), which does not fall under either category, but which would seem to approximate more nearly to secured than to unsecured loans, is the case of a lender taking his borrower's personal security for repayment of the money advanced, with or without interest, but taking bonuses in fully-paid shares or other things. If A. lends B. 100*l.*, and B. gives A. a bonus of shares worth 100*l.*, it is clear that A. really does not risk his principal any more than he does if, instead of taking the shares by way of bonus, he takes them, or anything else of equivalent value, by way of security. Probably the principal difficulty which will be experienced in cases of this class will be to ascertain the value of the shares, or other valuable consideration given as bonus, at the date of the transaction. As *Bonnard* v. *Dott* shows, if any authority were needed for such a plain proposition, it is not the value which shares may afterwards go to, but their value at the date of the impugned transaction which must be had regard to.

The relative knowledge, or means of knowledge, of the parties as to the nature and value of the shares given as bonus must also, in most cases, constitute an important

(*x*) 92 L. T. 822; affirmed on different grounds, [1906] 1 Ch. 740.

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factor in the case. There is this great distinction to be observed between the transfer or deposit of shares as security for payment of the amount agreed to be paid, and cases of this class, that where shares are given as security they are redeemable on payment of the amount agreed to be paid, whilst if given as a bonus they become the absolute property of the lender in any event.

Part v. *Bond*.

In *Part* v. *Bond* (*y*) the borrower was a lady, who had a life interest in settled funds which produced 1,250*l.* a year. She had already borrowed 4,000*l.* from an insurance office, which was secured by a first mortgage and a policy of insurance on her life, which she had effected for the purpose of that transaction and which was included in the mortgage. This charge involved payments of 650*l.* a year, and she was thus left with 600*l.* a year free income. The defendants lent her 1,000*l.* on security of a second mortgage of her life interest bearing interest at 45 per cent. per annum. On the defendants pressing for repayment, the plaintiff, through her solicitors, was able to obtain a further advance of 2,500*l.* from the insurance office at 5½ per cent., out of which she paid off the defendants' mortgage, and then brought her action for relief.

JOYCE, J., gave relief upon the footing of 10*l.* per cent. interest. In giving judgment he said:—

> "There is no indication in the Act as to what is an excessive rate of interest, or as to what is harsh and unconscionable. Conduct may be harsh, and I think that the defendants' solicitors' conduct might be so termed having regard to the way in which the security was enforced (*z*). As to the rate of interest, if it were much

(*y*) 93 L. T. 49; affirmed, C. A., 94 L. T. 390.

(*z*) The writers submit that harsh conduct in enforcing or seeking to enforce the security is not the sort of harshness which the Act points to. It is submitted that harsh conduct within the Act must be harsh conduct in bringing about the transaction and in obtaining the security or contract. Once properly obtained, the right to it cannot be impaired by proceedings being instituted to enforce the lender's rights, even if such

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above 10*l.* per cent. upon a reasonably safe security that would be excessive, and if it was obtained through the weakness or folly or urgent necessity, real or imaginary, of the borrower, and the lender had knowledge that it was so, the transaction might be termed harsh and unconscionable. In this case it cannot be said that there is any right to relief apart from the Act. The borrower is a lady, and certainly not a wise one. On the whole, I am of opinion that the rate of interest was excessive, and further that, having regard to all the circumstances, the transaction was harsh and unconscionable, and the plaintiff is entitled to relief under the Act."

This decision was affirmed by the Court of Appeal (*a*).

In *The Victorian Daylesford Syndicate, Ld.* v. *Dott* (*b*) the defendant held security, but the case does not throw much light upon the application of the Act to secured loans, as the plaintiffs succeeded on grounds which had no relation to the nature or value of the security held by the defendant.

The two cases just referred to, together with *Blair* v. *Buckworth* presently to be mentioned, are the only reported cases under the Act with which the writers are acquainted, which have dealt with secured loans.

In *Blair* v. *Buckworth* (*c*) the Court of Appeal, reversing CHANNELL, J., re-opened a transaction upon the ground, mainly, that by reason of the security which the money-lender obtained he was not justified in charging so high a rate of interest as 44 per cent.

The security obtained in this case was an equitable mortgage upon an estate of considerable value, subject to prior incumbrances. The security was in fact sufficient to cover the amount advanced with interest, which the

proceedings are carried on with the utmost rigour of the law. Harshness in pursuing legal remedies does not, however, predispose the Court in the money-lender's favour in any question which may arise.

(*a*) 94 L. T. 390.

(*b*) [1905] 2 Ch. 624; affirmed, C. A. [1906] 1 Ch. 747.

(*c*) 24 T. L. R. 474.

Court allowed at the rate of 10 per cent. The case is not, however, a clean authority upon the subject of setting aside a transaction where security is taken merely upon the ground of the interest charged being so excessive as to condemn the transaction as harsh and unconscionable, for the reason that there were other grounds which in the opinion of the Court stamped the transaction as harsh and unconscionable, and upon which the Court based its judgment to a considerable extent.

OF THE PERIOD OF TIME TO BE REGARDED IN ESTIMATING THE RISK, etc.

If, after the date of the transaction which is being inquired into, things have turned out worse than was anticipated at the time when the bargain was entered into, *e.g.*, a surety become bankrupt, or a security proved worthless, it will, in the writers' experience, be found that the money-lender will at the trial seek to make as much as he can of such later events as justifying the high rate of interest charged. On the other hand, if the borrower's position has since improved (*e.g.*, if a reversionary interest has fallen in, or some property sold for a price which has yielded an unexpected surplus after discharging prior incumbrances), the borrower may be trusted to lay stress upon these matters as demonstrating how small the risk really was, and how unjustifiable was the rate of interest charged.

For some purposes it is impossible to exclude evidence of what has happened since the date of the loan, as such evidence may be strictly relevant to the question whether the interest charged was excessive. For instance, a borrower gives a second charge upon property already heavily mortgaged. The value of that charge as a security must be regarded as of the date when it was given. But the fact that within a twelvemonth the property was sold by the mortgagees and realised a certain

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price cannot be excluded as evidence of what the property was really worth at the date when the charge was given. Property being worth, generally speaking, what it will fetch, what it in fact sold for shortly afterwards must be some evidence of what it was worth at the date of the loan. On the other hand, the duration of life being uncertain, the death of a man shortly after the date of the transaction (unless he was known at the date of the transaction to be suffering from the illness whereof he shortly afterwards died) would generally afford no evidence of the value of a policy of insurance upon his life, or of a reversion expectant upon his death regarded as at the date of the loan.

It cannot be too steadily held in view that *in considering whether the interest charged is excessive, having regard to the risk and all the circumstances of the case, regard must be had to the date of the transaction, and to that date alone, to the entire exclusion of any question how things have subsequently turned out,* and any evidence which may be tendered on either side of facts or events which have happened since the transaction, is only receivable so far as it is relevant to the question of what the money-lender's appreciation of the risk at the time was or ought reasonably to have been.

Of course, if the money-lender deposes that at the date of the loan he regarded a surety as of doubtful solvency, or a security as of doubtful value, it is impossible to prevent him from pointing to the fact that the surety shortly afterwards became bankrupt, or the security proved worthless, in confirmation of the truth of his evidence.

Further, the writers submit, that *the inquiry which the Judge has to make in order to ascertain whether the interest charged is excessive,* having regard to the risk and to all the circumstances of the case, *is not an inquiry into the risk really run by the money-lender, or into such circumstances of the case as may have existed in fact but unknown to the*

money-lender, but it is an inquiry into the risk as it ought to have been appreciated by the money-lender, and into the circumstances of the case as they were made known to him, or as he might and ought to have ascertained them to be, if he had made such inquiries as a reasonable and prudent man in the circumstances ought to have made.

It is impossible to lay down any general rule as to the inquiries which a money-lender ought to make. Applications to money-lenders for loans are generally dictated by a more or less immediate occasion for the money, and in case the borrower is in a hurry and it is of importance to him that the advance, if made at all, should be made promptly, a money-lender could not be expected to embark upon a course of inquiries, the time consumed by which would tend to defeat the object of the loan.

KEKEWICH, J., in *Saunders* v. *Newbold* (*d*), mentioned as one of the grounds of re-opening the transaction in that case that if the money-lenders had chosen to make inquiries at the borrower's bankers they would have discovered that the borrower's position was such that lenders of far larger sums than they contemplated lending would run no risk whatever. Whatever force there may have been in this observation in relation to the very peculiar facts of that case, it can scarcely have been intended to be of general application, for in almost every case one would suppose that the borrower would strongly resent any such inquiry being made, and would, indeed, probably regard it as a gross breach of faith. A man who has a bank account is not usually likely to have recourse to a money-lender until he has exhausted such accommodation as his banker is willing to give him, and his banker, one would think, would be the last person whom the average borrower would wish to know that he was having recourse to money-lenders.

So far as the money-lender's source of information is

(*d*) VAUGHAN WILLIAMS, L.J., in [1905] 1 Ch. at p. 274, quoted the observations, as it would seem, without disapproval.

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the proposing borrower himself, it may be rather a delicate matter for the Judge to decide how far the money-lender ought to have accepted the borrower's statements as true. Whilst it would, generally speaking, be obviously unjust to the money-lender to treat him as bound to accept as true everything that the borrower may have told him about his position, prospects, and resources; so on the other hand it would be unjust to the borrower to permit the money-lender to take up the position that, having no reasonable grounds for disbelieving the borrower, he chose to proceed upon the assumption that all that the borrower stated about himself was a pack of lies from beginning to end.

The difficulty, in many cases, of putting oneself back into the chair of the money-lender in order to arrive at a just conclusion as to what his appreciation of the risk ought to have been at the time appears to the writers to be one which no Judge can be expected to perform with any reasonable approximation to certainty.

HARSH AND UNCONSCIONABLE.

The question when a transaction will be condemned as harsh and unconscionable solely upon the ground of excessive interest, has already been fully dealt with. The following notes are confined to cases where there is some circumstance of harshness or unconscionableness other than merely excessive interest.

It must not be supposed, however, that the various grounds upon which a transaction may be attacked as being harsh or unconscionable are to be regarded as independent of each other. Cases may be conceived in which the rate of interest, although "excessive," might not be so excessive as of itself to afford a ground for relief, if such excessive interest had stood alone, yet that where combined with some circumstance of a harsh or unconscionable character, the Court might re-open the

transaction on account of the cumulative effect of these considerations. The Court must have regard to all the circumstances of the case, and it is submitted that the Court might properly re-open a transaction on account of the co-existence of several circumstances, the cumulative effect of which might stamp the transaction as harsh and unconscionable, although any one of such circumstances, taken by itself, would not have that effect.

With this qualification we proceed to consider some of the circumstances other than excessive interest which may render a transaction harsh and unconscionable and lead the Court to re-open it.

The circumstances referred to in this note cannot, of course, be regarded as exhaustive.

The Incapacity of the Borrower.—The question of the capacity or incapacity of the borrower and his thorough understanding and appreciation of the terms of the bargain, or his failure to appreciate the bargain, or any material term thereof, are important facts to consider. But the competency of the borrower and his full appreciation of the terms is not decisive: it is only one of the circumstances which the Court has to take into consideration. It will be entitled to greater or less weight according to all the circumstances of the case and to the grounds put forward by the borrower for impugning the transaction.

The LORD CHIEF JUSTICE in *Blair* v. *Buckworth* (*e*), said:—

> "Mr. Justice CHANNELL does not seem to have appreciated sufficiently the view whether, though the defendant knew of the rate of interest and was willing to accept it, the circumstances were such that the bargain ought not to stand. . . . Looking at the transaction as a whole it is, in my opinion, harsh and unconscionable, considering the security plaintiff was getting for the loan, to take from the borrower a promissory note, which gave plaintiff so large a

(*e*) 24 T. L. R. 474.

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bonus. In my opinion *the Act was intended to protect borrowers against themselves.* The lender here knew that the borrower had to go to Russia in a few days, and the opportunity was taken to make him agree to the terms in order to get the money."

FARWELL, L.J., in the same case, said :—

"The Act says nothing about the knowledge of the borrower as to what the terms were. The fact that the borrower knew all about the transaction is only one element to be taken into consideration in seeing whether the transaction was harsh and unconscionable. The money-lender here knew of the urgent necessity of the borrower for the money within a few days, and that it was essential for him to leave for Russia with the money. In my opinion the plaintiff took advantage of that necessity, and it seems to me that the rate of interest was quite extravagant in view of the sufficiency of the security and the nature of the risk run. The transaction must be set aside."

In view of these pronouncements it is necessary to regard with caution the cases in which Judges had previously refused relief to borrowers upon the ground that they were competent borrowers, who fully understood and appreciated the nature and effect of the bargain.

CHANNELL, J., in his considered judgment in *Carringtons, Ld.* v. *Smith* (*f*) laid very great stress upon the competence of the borrower, and his complete understanding of the transaction, and his voluntary assent to the terms. *Samuel* v. *Newbold* (*g*) in the House of Lords, whilst it overruled the judgment of CHANNELL, J., in *Carringtons, Ld.* v. *Smith* as far as that judgment had laid down that excessive interest alone would not suffice to re-open a transaction, was generally thought not to have displaced a great portion of that judgment wherein the learned Judge emphasized the importance to be attached to the competence of the borrower and his thorough understanding

(*f*) [1906] 1 K. B. 79.
(*g*) [1906] A. C. 461.

of the bargain. The writers do not suggest that *Carringtons, Ld.* v. *Smith* was not perfectly well decided upon the special facts of that case, or that the learned Judge in any way went wrong in attaching, as he did, great weight to the competency and understanding of the borrower in the circumstances of that case. Moreover, they regard *Carringtons, Ld.* v. *Smith* as still of authority upon certain points dealt with in the judgment, and they submit that notwithstanding all that has happened since, it still survives as an authority very proper to be had regard to in cases closely similar in their facts to that case; but so far as the judgment of CHANNELL, J., was intended to be of general application, they submit that the remarks of the learned Judge as to the weight to be attached to the competence of the borrower and to his understanding of the terms must be read with due regard to the judgments delivered in the House of Lords in *Samuel* v. *Newbold* and in the Court of Appeal in *Fieldings* v. *Pawson* (*h*), and *Blair* v. *Buckworth* (*i*).

It may be useful to collect in this place the passages in the speeches of the Lords in *Samuel* v. *Newbold* (*k*), and of the majority of the Court of Appeal in *Fieldings* v. *Pawson* (*h*) which bear upon this question. They appear to be the following.

Lord LOREBURN, L.C., in *Samuel* v. *Newbold* (*m*) :—

> "A transaction may fall within this description (*i.e.*, harsh and unconscionable) in many ways. It may do so because of the borrower's extreme necessity and helplessness, *or because of his situation in other ways.* These are only illustrations, and, as in the case of fraud, it is neither practicable nor expedient to attempt any exhaustive definition. What the Court has to do in such circumstances is, if satisfied that the interest or charges are

(*h*) App. G.
(*i*) 24 T. L. R. 474.
(*k*) [1906] A. C. 461.
(*m*) [1906] A. C. at p. 467.

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excessive, to see whether in truth and fact and according to its sense of justice the transaction was harsh and unconscionable."

Lord MACNAGHTEN said, at p. 471 [and see also the passage from his speech already quoted, *ante*, p. 15]:—

> "Even assuming that Mr. Alton was in some distress, it must be remembered, as Sir WILLIAM GRANT said, 'It is not every bargain which distress may induce one man to offer that another is at liberty to accept' (*Bowes* v. *Heaps*") (*n*).

Lord JAMES OF HEREFORD said, at p. 471:—

> "Now the objects of the Act can easily be traced from its contents. The ends sought to be remedied by it were generally recognised. A class of men well known under the term money-lenders were, under different names and disguises, carrying on the business of lending money. No usury laws remained to restrain them, and so in many instances they lent money at as high a rate of interest as could be wrung from the necessities of the borrower. . . ."

The LORD CHIEF JUSTICE in *Fieldings* v. *Pawson* (*o*) said:—

> "I am clearly of opinion, and I think the House of Lords has distinctly affirmed the proposition, that if there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive the Court has power to interfere *independently of other circumstances.*"

And again:—

> "The learned Judge has thought, and he so said, that because Mr. Pawson was anxious to help his brother, was anxious to get 400*l.* for himself, knew that a large amount of this money was going to be paid in interest, that therefore he was content to make whatever bargain the people

(*n*) (1814) 3 V. & B. 117, 119; 13 R. R. 162.
(*o*) App. G.

put before him. In my judgment that is not sufficient under the Statute. *The statute was passed to protect people who do this kind of thing if the rate of interest is excessive.*"

FARWELL, L.J., in the same case said :—

"The Act of Parliament has cast upon the Court the necessity, very much against the will of the Judges who have had to deal with the matter, of remodelling the terms which were entered into by persons *sui juris* (*p*). . . . It seems to me that the policy of this Act was to enable the Court to prevent oppression."

And again :—

"I do not myself attach much importance to the statement by the borrower in the letter that he knew what was to become of the money. In all these cases of money-lenders the borrower always is ready and willing to sign any document which they put before him. It is a circumstance to be considered, no doubt, but if it were conclusive against the borrower, none of these cases would ever come to the Court with any chance of success at all."

Fraud : Misrepresentation.—It is unnecessary to specially consider here fraud or misrepresentation generally as affording a defence to an action of contract, or as entitling the deceived party to rescission. The ordinary principles of law apply to contracts of loan in the same way as they apply to other contracts.

Undue Pressure :—Taking Undue Advantage of the Borrower's Necessities.—It is impossible to attempt an exhaustive enumeration of the circumstances of pressure which may be expected to be met with in money-lending cases. All that can be done here is to refer to certain of the cases decided under the Act in which the borrower was relieved upon some such ground.

In *Blair* v. *Buckworth* (*q*) relief was given on two

(*p*) See note as to this expression, *ante*, p. 17.
(*q*) 24 T. L. R. 474.

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grounds: (1) Excessive interest; (2) Taking advantage of the necessities of the borrower. The first ground has already been discussed (*r*). The second ground was this: The lender knew that the borrower was obliged to take out to Russia the sum of money which he had applied to borrow (7,500*l.*) in the course of a few days in order to save certain valuable concessions in which he was interested. At the last moment, when it was too late for the borrower to raise the money elsewhere, the lender demanded a bonus of 900*l.* The borrower was so fixed that he had no option but to agree to the lender's terms.

Bonnard v. *Dott* (*s*). In this case plaintiff had borrowed money from defendant from time to time, and had got himself so completely in the defendant's hands that he had reduced himself to a state of utter helplessness, and was so situated that he had no option but to consent to the terms imposed upon him from time to time as consideration for advances and renewals. The facts will be found stated in the Digest of Cases (*t*). A singular feature of this case was that in several instances the terms complained of had been proposed by the plaintiff (the borrower) himself, ostensibly quite voluntarily. Plaintiff was engaged in promoting a company which afterwards turned out a success, and defendant had financed him during the lean time. It was a case of "whilst the grass grew the steed starved." The case well illustrates Sir WILLIAM GRANT'S saying in *Bowes* v. *Heaps* (*u*), quoted by Lord MACNAGHTEN in *Samuel* v. *Newbold* (*x*) that, "It is not every bargain which distress may induce one man to offer that another is at liberty to accept."

(*r*) Page 28.
(*s*) 92 L. T. 822.
(*t*) App H.
(*u*) (1814) 3 V. & B. 117, 119; 13 R. R. 162.
(*x*) [1906] A. C. at p. 471.

KEKEWICH, J., thus described the relations between the parties:—

> "It goes without saying that when once these two men were brought together one was entirely under the influence and control of the other. It was the business of the defendant to keep the plaintiff afoot, and it was the urgent need of the plaintiff to be kept afoot on any terms. It was, of course, quite possible for the business of lending and borrowing to be transacted between them on fair terms; but the temptation on the one side to exact harsh terms was great, and there could be no power of resistance."

This case is valuable as an authority upon the question how far a lender may go in obtaining bonuses from a borrower who requires advances to enable him to carry through a speculative business, the successful result of which affords the only prospect the lender has of obtaining repayment.

Poncione v. *Higgins* (*y*). This was a case of a widow (the plaintiff) who, being in difficulties owing to several money-lending transactions with other money-lenders, placed herself in the hands of the defendant, who advanced her certain moneys, but who took advantage of her necessities to impose upon her terms as to commission and so forth which the Court considered to be harsh and unconscionable.

Inasmuch as the only advantage which a money-lender is likely to take of a borrower's necessities is to extract from him "excessive" interest; and as in almost every case in which the necessities of the borrower place him at the mercy of the lender, the lender will be found to have taken advantage of the situation to such an extent as to bring the case within the principle which extends relief on the ground of excessive interest alone, most cases in which unfair advantage has been taken of a borrower's

(*y*) 21 T. L. R. 11.

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necessities will be found to fall also within the principle discussed in the note on excessive interest. Moreover, as in almost every case (*z*) relievable against on the ground of excessive interest the lender must have taken unfair advantage of the borrower's necessities, most of the cases may be grouped under either head.

Other Reprehensible Conduct of Money-lender.—By this the writers mean any conduct which meets with the strong disapprobation of the Court on some ground other than the driving of a hard and usurious bargain. "All the circumstances" of the case are to be considered, and the Court may, and will, treat as harsh and unconscionable loan transactions at high rates of interest which have been brought about by discreditable practices, or by means which are not consistent with fair dealing between man and man. In the present state of the authorities the writers do not feel justified in attempting any more definite or accurate definition. The following propositions may, however, be laid down with confidence as not likely to be dissented from, and which, indeed, may be taken to be established by *In re a Debtor* (*a*), and other cases.

(1) That in every case where, had the Act not been passed, Courts of Equity would have set aside a transaction upon the ground of misrepresentation, undue influence, catching bargains, breach of duty on the part of a person occupying a fiduciary relation towards the person claiming relief, or any other ground, there such transaction is relievable against under the Act.

(2) That the Act goes further than the doctrines of equity and relieves in cases which cannot be brought within the principles on which Courts of Equity granted relief.

(*z*) The facts of *Samuel* v. *Newbold* itself require the word "almost" to be used here. Alton was under no real necessity to borrow at all, let alone to borrow on such usurious terms.

(*a*) [1903] 1 K. B. 705.

(3) That the Act does not define the "circumstances" which, in a case which would not have been relievable against in equity, yet may be regarded as rendering the transaction "harsh and unconscionable."

Lending Money to a Youth in Reliance upon Fear of Exposure forcing his Parents to Pay.—In *King* v. *Osborne* (*b*) the borrower was a young officer in the army stationed in a garrison town. He had incurred considerable liabilities, including a liability to the plaintiff for money borrowed at a high rate of interest on security of his promissory note. With the assistance of his father, money was found to discharge his son's liabilities, including the plaintiff's promissory note, which was discharged by agreement by payment of a sum which represented the principal and interest at the rate of 100*l.* per cent. per annum. As part of the arrangement for extricating the officer from his embarrassments, money to the full value of his interest therein was raised upon his interest under his parents' marriage settlement, and the fact that he had no further available property beyond his pay, but that he was dependent upon his father for the allowance necessary to supplement his pay, were communicated to the plaintiff. The officer had promised his father that he would not again have recourse to money-lenders. Almost immediately after payment off of the plaintiff's note, the plaintiff tempted the officer to borrow again from him at the same high rate of interest as before, and JELF, J., found that the plaintiff had done this relying upon being able in due course, if the loan was not repaid by the officer, to squeeze a settlement from his father, who, he thought, would pay rather than suffer his son's conduct to be exposed. Relief was granted (*c*).

Improperly tempting Borrower.—In *Samuel* v. *Bell* (*d*)

(*b*) 20th May, 1905. It may be observed that independently of the Act the borrower in a case of this sort would probably have been entitled to relief in equity: *Nevill* v. *Snelling*, 15 Ch. D. 679.

(*c*) See *The Times*, 22nd May, 1905.

(*d*) 22 T. L. R. 118.

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the defendant, who carried on business in a city in the provinces, applied to the plaintiff by letter for a loan. The plaintiff wrote in answer that he would advance 200*l.*, the interest to be 100*l.* to be paid off at the rate of 25*l.* a month, ranging over twelve months. This offer the defendant declined by letter on the ground that the interest was too high. Defendant had borrowed money from money-lenders on other occasions. Upon receipt by the plaintiff of defendant's letter declining the proffered loan, the plaintiff sent by post to the defendant 200*l.* in Bank of England notes with a promissory note for 300*l.* payable by twelve equal monthly payments of 25*l.* each. The defendant being in urgent need of the money kept the notes and signed and returned the promissory note. The defendant paid five instalments and then made default and was promptly served with a writ. The defendant then appealed to the plaintiff to make some reduction in the amount if he paid the full amount, but this the plaintiff refused to do. Thereupon the defendant with great difficulty raised the money and paid the plaintiff the balance due with the costs of the writ. Within a week after this the plaintiff's agent called upon the defendant and made excuse for the harsh conduct of the plaintiff that the matter could not have been brought to the plaintiff's personal attention, and so forth, and tempted the defendant again to borrow 200*l.* upon the same terms as before. Defendant having made default and being sued for the balance due upon the fresh note, the defendant claimed relief not only against the second transaction but against the first also. By consent, the Judge dealt with the action, which came before him in the short cause list, as if the defendant had filed a counterclaim claiming relief in respect of the first transaction which had been closed by payment. CHANNELL, J., re-opened both transactions and directed an account to be taken on a 20 per cent. basis. Relief against the two transactions was granted upon grounds different as to each.

As to the second transaction, it was re-opened partly on the ground that the advance of the second 200*l.* amounted substantially to restoring to the defendant the money of which he had been deprived by the pressure of the writ and partly on the ground that the plaintiff, knowing the difficulties in which the defendant had been placed by the pressure of the writ, had taken an unjust advantage of his necessities (which necessities it will be observed the plaintiff had himself contributed to bring about).

The first transaction was relieved against on the ground that there had not been an "independent, fair and open agreement" to pay the rate of interest bargained for. In face of the defendant's refusal of the loan on the terms offered, the money-lender had sent him the bank-notes, trusting, as the event proved, that the defendant's necessities would be so urgent as to overcome his objection to pay the high rate of interest demanded. The evidence of the defendant as to his necessities at the moment was that he required the money to pay his men's wages.

One point of great importance decided in this case was that payment made by a borrower in default, under pressure of a writ, does not disentitle him to relief in respect of such payment. This point is further dealt with in the notes to sect. 1, sub-sect. (2).

That the money-lender's conduct in *Samuel* v. *Bell* in the first transaction may have been "unconscionable" may be conceded; but in what sense was it "harsh"? If "harsh" means anything different from "unconscionable," in what sense is it to be understood to support the decision in this case as to the first transaction? The words of the Act are harsh *and* unconscionable not "harsh *or* unconscionable." If one should say that everything "unconscionable" must be "harsh" and that everything "harsh" must be "unconscionable," then the two words are used to express the same meaning. The learned Judge in giving judgment said: "Tempting a

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man with money is 'unconscionable' if not 'harsh,'" so that the point did not escape his attention; but this case leaves us without any definition of the meaning of the word "harsh" as distinguished from "unconscionable," if, indeed, they do not mean one and the same thing, as this decision would seem rather to tend to indicate that they may do.

Deductions for Expenses.—The practice of making a deduction for expenses from the amount advanced is believed to have obtained much more generally formerly than it does at present. It is believed that it has been discontinued by the greater number of money-lenders. The practice is objectionable for many reasons. Where a deduction in the name of "expenses" has been made, it will often be found that such deduction exceeds the actual out-of-pocket expenses incurred, and this may be treated by the Court as a misrepresentation, or at any rate as harsh and unconscionable conduct entitling the borrower to relief. Even if limited to actual out-of-pocket expenses it is objectionable in at least three respects:—(1) It savours of harshness, in that it throws upon the borrower an expense incurred in negotiating or completing a contract presumably beneficial to the money-lender as well as to the borrower. (2) It renders more difficult to calculate the rate of interest and makes it less easy for the borrower to thoroughly appreciate the nature and effect of his contract. (3) Where a bargain has been made for the advance of a specific sum it may amount to a withholding of a part of that which the money-lender contracted to give to the borrower as the consideration for his contract.

The Period of Time to be Regarded.—JOYCE, J., in *Part* v. *Bond* (*e*), in discussing the meaning of the word "harsh," said:—

> "I think, however, that the conduct of the defendants' solicitor in attempting to enforce the security by a sale was very harsh."

(*e*) 93 L. T. 49.

CHANNELL, J., also, in *Levene* v. *Titchener* (*f*) said:—

> "In the present case two instalments were overdue, one of them only just overdue, when the money-lender issued his writ, but it had not been served when the money was paid, so that the only costs incurred were the costs of the writ, but the money-lender proceeded to sign judgment in order to be able to issue execution if default were made in payment of any subsequent instalment." He thought *for these reasons* that the transaction ought to be re-opened.

Despite these *dicta*, the writers submit with some confidence that the words "harsh and unconscionable" have no reference to the manner in which the money-lender may act towards the borrower in the matter of prosecuting his legal remedies, whether by action, or by realising his securities. If the bargain is one which the money-lender is entitled to hold, it cannot matter anything whether he has been strict or lenient to the debtor in the enforcement of his rights. The language of the Act (sect. 1, sub-sect. (1)) it is submitted is too clear upon this subject to admit of doubt.

The sub-section says:—

> "Where proceedings are taken, &c., . . . and there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, &c., are excessive, and that, in either case, *the transaction is harsh and unconscionable*, &c., the Court may re-open the transaction, &c."

Neither of the *dicta* above referred to was essential to support the decision arrived at, and both *dicta* may be regarded as *obiter*.

OR IS OTHERWISE SUCH THAT A COURT OF EQUITY WOULD GIVE RELIEF.

It is not proposed to embark here upon an exhaustive or critical examination of the authorities in equity, or

(*f*) 23 T. L. R. 508.

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even to attempt an enumeration of them. The student is referred to the notes to *The Earl of Chesterfield* v. *Janssen* (*g*), in White and Tudor's Leading Cases in Equity, vol. 1. All that it is proposed to do in this place is, by reference to a few cases, to present what is hoped will be found to be an accurate general view of the law as it stood previous to the Money-lenders Act upon the subject of relief in equity against unconscionable bargains.

It must always be borne in mind in considering any decision in equity previous to the repeal of the usury laws, that whilst those laws were in force transactions which fell within their scope and offended against them were avoided thereby quite independent of any circumstances of an unconscionable character which may have entered into or been attendant upon such transactions.

The repeal of the usury laws, however, did not affect the jurisdiction of the Court of Chancery to protect that somewhat vaguely defined class of persons known as "expectant heirs" (*h*), and, accordingly, if the facts were such that a Court of Equity would have interfered before the repeal of the usury laws, it would still have interfered between such repeal and the Money-lenders Act, except so far as the objections might have been founded upon usury alone.

COLLINS, M.R., in *In re a Debtor* (*i*), said:—

> "Before the [Money-lenders] Act, the Courts of Equity used to give relief in special cases when the parties stood in a particular relation to each other, or upon the ground of fraud or undue pressure upon the borrower, but they did not regard excessive interest alone as a ground for setting aside a bargain in the absence of some particular relation between the parties, as, for instance, if the borrower was an expectant heir."

(*g*) 2 Ves. 125.

(*h*) *O'Rorke* v. *Bolingbroke*, 2 A. C. 814; *Miller* v. *Cook*, L. R. 10 Eq. 641; *Tyler* v. *Yates*, L. R. 11 Eq. 265; *Howley* v. *Cook*, 8 Ir. R. Eq. 570; *Aylesford* v. *Morris*, L. R. 8 Ch. 484; *Nevill* v. *Snelling*, 15 Ch. D. 679.

(*i*) [1903] 1 K. B. 705.

RIDLEY, J., in *Wilton* v. *Osborne* (*k*), said:—

"It appears to be established by a series of decisions that a Court of Equity will not grant relief in such cases merely because the charges or interest are excessive. Every case has, indeed, to be judged by its own circumstances; but unless the borrower be of the class known as 'expectant heirs' (which requires distinct consideration), the rule is that, assuming him to be of full capacity, relief will not be granted unless it can be shown that he has been overreached, tricked, or deceived, and that the money-lender has taken an unfair and undue advantage of his weakness and necessities. The general rule is that neither excess of interest nor exorbitance of charge will suffice unless the element of unfair dealing is found to have existed."

JESSEL, M.R., in *Middleton* v. *Brown* (*l*), said:—

"What is the meaning of the term 'hard bargain'? If it has any distinct meaning at all, as distinguished from a mere term of abuse, it means in equity an unconscientious bargain—that is, a taking advantage of the position of one of the parties to the contract, and when I say 'taking advantage,' I mean, of course, taking an unfair advantage. When you have come to that point, and you have brought your proofs up to that, there is no doubt a case in which equity will relieve against such a bargain and set it aside altogether."

DENMAN, J., in *Nevill* v. *Snelling* (*m*), said:—

"I can find no case which decides that the interference of the Court is limited to cases in which the dealings have been with expectant heirs or reversioners, or to cases in which the dealing has been one in relation to the

(*k*) [1901] 2 K. B. 110. The overruling of the decision in this case by the C. A. in *In re a Debtor*, [1903] 1 K. B. 705, in no way impairs the value of the passage quoted in the text. The judgment was a considered one.

(*l*) 38 L. T. 334. This was not a money-lending case, but the observations are applicable to money-lending cases.

(*m*) 15 Ch. D. at p. 703.

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expectancy; and I gather from the expressions used in several of the cases, that if the transactions are such as to show that the money-lender has throughout been unconscientiously trading upon the weaknesses of the borrower, commencing operations with him during his minority (*n*), charging him with usurious interest, and endeavouring to entangle him more and more in indebtedness, not as a fair matter of business, but looking to the chances of extorting money from others interested in the debtor (*o*), especially if there be any unfair dealing in the course of the transactions which are before the Court, the Court will so far restrain the transaction as to compel the money-lender to be satisfied with the sums advanced and fair interest for them. The real question in every case seems to me to be the same as that which arose in the case of expectant heirs and reversioners before the special doctrine in their favour was established—that is to say, whether the dealings have been fair, and whether undue advantage has been taken by the money-lender of the weakness or necessities of the person raising the money. Sometimes extreme old age has been unduly taken advantage of, and the transaction set aside. Sometimes great distress. Sometimes infancy has been imposed upon, and transactions, though ratified at full age, have been set aside because of the original vice with which they were tainted (*p*). In every case the Court has to look at all the circumstances. In some cases the conclusion may result that there exists mere inadequacy of price (*q*), or exorbitance of interest charged, in which case the transaction will not be interfered with. But in others, taking the

(*n*) This was said with special reference to the facts of *Nevill* v. *Snelling*. Getting a young man into the toils before he comes of age is a strong—probably in most cases it would be in itself a decisive—circumstance in favour of granting relief.

(*o*) This, again, was said with special reference to the facts of the case. That this circumstance may be in itself sufficient to entitle the borrower to relief under the Act appears from *King* v. *Osborne*, referred to, *ante*, p. 41.

(*p*) The Infants' Relief Act, 1874, now renders such ratifications absolutely void.

(*q*) This refers to sales and not to borrowings.

whole history together, it may present so many features of unconscientiousness, extortion, and unfair dealing on the one side and weakness on the other, as to compel the Court to exercise its equitable jurisdiction."

It may be doubted whether there was not sufficient in *Nevill* v. *Snelling* to have entitled the borrower to relief upon the principles above stated, even had he not come within the class of "expectant heirs." But the chief interest in the decision lies in the circumstance that DENMAN, J., held that the specially protected class of expectant heirs was not limited to actual dealings with reversions or expectancies, or even to *post obits*, or transactions entered into directly with reference to reversionary interests and expectancies, but embraced a young man, a younger son of a father possessing large property, who had no property of his own nor any expectation of any except such expectations as were founded upon his father's position in life, the money being lent upon the credit of such general expectations, and in the hope of extorting payment from the father to avoid the exposure attendant on the son being made a bankrupt.

In *The Earl of Aylesford* v. *Morris* (*r*), a young nobleman, in his twenty-second year, entitled to large property in the event of his surviving his father, was largely indebted. The creditor pressed for payment, and recommended the young nobleman to apply to a certain money-lender. The money-lender advanced money enough to in part pay off the creditor, and made a further advance to the young nobleman, taking by way of securities his acceptances at three months for the sums advanced, with interest and discount, together exceeding the rate of 60 per cent. The acceptances became due, and the process was repeated, the young nobleman receiving a small advance. The borrower had no professional assistance in these matters, and no application was made

(*r*) L. R. 8 Ch. 484.

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to his father, or to the solicitors of the father. The father died before the second set of bills became due and the money-lender commenced actions upon them.

It was held by the Earl of SELBORNE, L.C., and MELLISH, L.J., affirming WICKENS, V.-C., that the actions must be restrained (*s*), and a decree made for the delivery up of the bills on payment of the sum actually advanced with interest at 5 per cent.

An attentive perusal of the judgments of the Earl of SELBORNE, L.C., in *Aylesford* v. *Morris* (*t*); of DENMAN, J., in *Nevill* v. *Snelling* (*u*); of JESSEL, M.R., in *Bennet* v. *Bennet* (*x*); and, as to dealings with reversionary interests, of the Court of Appeal in *Brenchley* v. *Higgins* (*y*), will give the reader a good general view of this subject.

The following extracts from the judgment of the Earl of SELBORNE, L.C., in *Aylesford* v. *Morris*, must suffice for this note :—

> "The usury laws proved to be an inconvenient fetter upon the liberty of commercial transactions; and the arbitrary rule of equity as to sales of reversions was an impediment to fair and reasonable, as well as to unconscionable, bargains. Both have been abolished by the Legislature; but the abolition of the usury laws still leaves the nature of the bargain capable of being a note of fraud in the estimation of the Court; and the Act as to sales of reversions (31 Vict. c. 4) is carefully limited to purchases 'made *bonâ fide* and without fraud or unfair dealing,' and leaves undervalue still a material element in cases in which it is not the sole equitable ground for relief. . .

(*s*) This case was before the Judicature Acts.
(*t*) L. R. 8 Ch. 484.
(*u*) 15 Ch. D. 679.
(*x*) 43 L. T. 246.
(*y*) 83 L. T. 751. This case shows the extent to which the old doctrines of equity as to the purchase of reversionary interests are still in force since the Sales of Reversions Act, 1867.

"Lord CRANWORTH said, in a recent case in the House of Lords (*z*), that no influence can be more direct, more intelligible, or more to be guarded against, than that of a person who gets hold of a young man of fortune, and takes upon himself to supply him with means, pandering to his gross extravagance during his minority, and extorting from him, or at least obtaining from him, for every advance that he has made, a promise that the moment he comes of age it shall be all ratified, so as to make the securities good (*a*). The circumstances of the particular case in which these words were spoken, differed widely from those of the case now before us; the element of personal influence is here wanting. *But it is sufficient for the application of the principle if the parties meet under such circumstances as, in the particular transaction, to give the stronger party dominion over the weaker; and such power and influence are generally possessed, in every transaction of this kind, by those who trade upon the follies and vices of unprotected youth, inexperience and moral imbecility.*"

The LORD CHANCELLOR then goes on to explain the grounds upon which Courts of Equity threw, and still throw (though perhaps not to quite the same extent as formerly), protection round the "expectant heir."

Save that the doctrine that persons dealing with expectant heirs for reversionary interests, and so forth, have placed upon them the *onus* of showing that full value was given and no unfair advantage taken has never (so far as the writers know) been applied to ordinary unsecured money-lending transactions, the following remarks of Lord SELBORNE seem to be applicable to such transactions where the borrower has only recently come of age:—

"In the cases of catching bargains with expectant heirs, one peculiar feature has been almost universally present;

(*z*) *Smith* v. *Kay*, 7 H. L. C. 771.

(*a*) *Aylesford* v. *Morris*, in which this passage was quoted, was not a case where the money-lender had got hold of a youth during his minority.

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indeed, its presence was considered by Lord BROUGHAM to be an indispensable condition of equitable relief, though Lord ST. LEONARDS, with good reason, dissents from that opinion (*b*). The victim comes to the snare (for this system of dealing does set snares, not, perhaps, for one prodigal more than another, but for prodigals generally as a class) excluded, and known to be excluded, by the very motives and circumstances which attract him, from the help and advice of his natural guardians and protectors, and from that professional aid which would be accessible to him if he did not feel compelled to secrecy. He comes in the dark and in fetters, without either the will or the power to take care of himself, and with nobody else to take care of him. Great Judges have said that there is a principle of public policy in restraining this; that this system of undermining and blasting, as it were, in the bud the fortunes of families, is a public as well as a private mischief; that it is a sort of indirect fraud upon the heads of families from whom these transactions are concealed, and who may thereby be induced to dispose of their means for the profit and advantage of strangers and usurers, when they suppose themselves to be fulfilling the moral obligation of providing for their own descendants."

THE DEFAULT CLAUSE.

The default clause in its relation to Order XIV. is considered *post*, at pp. 76 *et seq.*

The default clause plays a very important part in money-lending cases, apart from its relation to Order XIV.

Whenever the question has been debated in Court, whether a transaction which took the form of a loan in consideration of a promissory note payable by instalments, with a default clause, was harsh and unconscionable, the Court has invariably, so far as the writers' experience extends, been furnished by the borrower's counsel with calculations of the comparative rates of interest charged in the alternative events of the instalments being regularly

(*b*) Sug. V. & P., 11th ed., p. 316.

paid in accordance with the terms of the note, and of default being made in payment of the first instalment, and the whole sum thereupon becoming due. The rate of interest which becomes payable in case default is made in payment of the first instalment is of course always very much larger than the rate of interest calculated regardless of the default clause, upon the footing that the instalments are punctually paid, and the Court is usually invited to reopen the transaction upon the ground that the rate of interest is so excessive as to render the transaction harsh and unconscionable, as evidenced by the enormous rate at which the interest works out upon the default clause coming into operation. This rate of interest is not infrequently calculated to shock the conscience of any one not himself a professional money-lender, and, to quote Lord THURLOW'S familiar expression (*c*), "to produce an exclamation at the inequality of it."

That the rate of interest brought into force by the operation of the default clause is an element to be taken into consideration by the Court appears from the judgments of Lord ALVERSTONE, C.J., and FARWELL, L.J., in *Fieldings* v. *Pawson* (*d*).

The LORD CHIEF JUSTICE at the commencement of his judgment referred to the rate of interest charged in case of default in the following terms:—

> "It is not disputed, in fact it is stated by Mr. Duke, on behalf of the money-lender, that the rate of interest, if the instalments were punctually paid, would be 139 per cent., and if the default clause comes into operation, it would be 218 per cent. . . . I think it was incumbent upon the money-lender to give some explanation of why in such a bargain it was proper for him to charge at the *rates* I have mentioned, of 139 per cent., *and still more* 218 *per cent. in the event of failure to pay by instalments.*"

(*c*) In *Gwynne* v. *Heaton* (1778), 1 Bro. C. C. 9.

(*d*) App. G. See also CHANNELL, J., in *Levene* v. *Titchener*, 23 T. L. R. 508.

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And later :—

> "Under these circumstances it does seem to me that if I am right in saying the Court is entitled to ask for some explanation of this rate of interest, not only have the money-lenders failed to give any explanation, but, so far as they have given any explanation, it negatives their right to make such an excessive charge, and *particularly to make such an excessive charge as* 218 *per cent. upon default being made.*"

FARWELL, L.J., said :—

> "It is impossible to say *à priori* what rate of interest is itself unconscionable, but I am prepared to say this, that 139 per cent., which is the lower rate here, *and* 218 *per cent., which is the higher rate here, and the one which is actually sought to be enforced,* is so monstrous," &c., &c.

Now if the question of excessive interest is a question which has to be solved by weighing in the balance as best one can the risk and all the circumstances of the case, it is evident that where the default clause is introduced both rates of interest cannot correspond to the rate of interest supportable by such risk and circumstances. Either the rate charged in the event of the instalments being punctually paid will correspond to the risk, &c., in which case the rate of interest charged in the event of default will be excessive ; or the default rate will correspond to the risk, &c., in which case the rate charged on the basis of the instalments being punctually paid (hereafter spoken of as the non-default rate) will be insufficient to compensate the money-lender for his risk. If, therefore, the default rate of interest is to be taken as the criterion to determine whether the interest is so excessive as to render the transaction harsh and unconscionable, money-lenders will be placed in this position : Either they will have to be satisfied, in the event of the instalments being regularly paid, with a rate of interest inadequate to the risk ; or they must abandon the use of the default clause altogether

on peril of having every transaction avoided as harsh and unconscionable. The Act provides a middle course which might be taken, but which, so far as the writers' experience is concerned, the Court has not yet been invited to take by counsel for a borrower, and has not as yet taken upon its own initiative. The Court might hold the transaction severable, and in pursuance of the power in that behalf clearly given to it by sect. 1, sub-sect. (1), of the Act might "set aside in part, revise, or alter, the security given, or agreement made"—might expunge the default clause, leaving the rest of the bargain to stand. In *Levene* v. *Greenwood* (*e*) and *Levene* v. *Titchener* (*f*) the Court set aside the whole transaction on the ground that the borrower had not properly appreciated the effect of the default clause (*g*). In cases of this class, where the only ground for re-opening the transaction is that the borrower did not appreciate the default clause, the writers submit that the expunging of the default clause, rather than the ripping up of the whole transaction, might more nearly work justice between the parties.

The writers, however, submit, that where the non-default rate of interest charged is held not to be excessive, the transaction ought not to be re-opened merely because the default clause is inserted, upon the coming into operation of which a much higher rate of interest becomes payable. Parties to contracts may be supposed to contemplate their performance rather than their non-performance, and it would seem to be going too far to hold that a default clause, which is to some extent in the nature of a penalty clause designed to protect the one party against a breach of the contract by the other, necessarily renders the contract harsh and unconscionable.

(*e*) 20 T. L. R. 389.

(*f*) 23 T. L. R. 508.

(*g*) There is an Irish case—*Wells* v. *Joyce*, [1905] 2 Ir. R. 134—in which the Court set aside a transaction on this ground, approving the judgment of CHANNELL, J., in *Levene* v. *Greenwood*, *ubi sup.*

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The insertion of the default clause is, however, clearly a circumstance to be had regard to in considering whether the transaction viewed as a whole is harsh and unconscionable; and *Fieldings* v. *Pawson* must be regarded as an authority for the proposition that in considering whether the interest charged is excessive, the Court is not confined to considering whether the non-default rate of interest is excessive, but may consider whether the default rate of interest is excessive.

Probably it would be correct to say that where a transaction provides for payment of one rate of interest in the event of the contract being performed according to its terms, which we term the non-default rate, and for another rate of interest in the event of the borrower making default in payment, which we term the default rate, if the non-default rate is not excessive but the default rate is excessive, and moreover so excessive that if the non-default rate had been at that rate the transaction would have been condemned as harsh and unconscionable by reason of such excess, it does not *necessarily* follow that the transaction will be held to be harsh and unconscionable because of the excess of the default rate. But it *may* be so held; the question being one to be considered as a circumstance with all the other circumstances of the case, and a circumstance to which greater or less weight must be attributed according to all the facts of the case.

The writers venture to suggest that in considering whether the insertion of a default clause should in any particular case be held to render a transaction harsh and unconscionable, it might not be amiss to see whether the default clause is so worded as to come into operation in case default is made in payment *on the day*, or whether it allows a reasonable time (*e.g.*, seven days) for payment of the instalments, or provides for the money-lender giving the borrower some reasonable notice; also that a default clause providing for a substantial rebate in the amount of

interest payable in case, by its operation, the principal becomes sooner due, would present an appearance of equity and fair dealing between man and man which would be of refreshing novelty, anything of the sort being conspicuously absent from the default clause commonly met with, which not only entitles the money-lender to demand immediate payment of the balance remaining unpaid of the amount actually advanced (the fairness of which is, speaking generally, not open to question), but entitles him also to demand immediate payment of the whole sum charged for interest, the amount of which was presumably fixed originally in some measure in relation to the period of time over which the loan was intended to extend.

The ill-fortune which has befallen CHANNELL, J.'s, famous judgment in *Carringtons, Ld.* v. *Smith* (*h*), and the judicial criticism to which that judgment has been subjected, elsewhere noticed, does not appear to the writers to have seriously or at all impaired the value of that part of his judgment in which he discussed the default clause, which he referred to as "a money-lending trap." Accordingly we here reprint the following note from p. 55 of "The Law of Money-lending, Past and Present," entitled :—

The Default Clause as "a Money-lending Trap."—The clause which makes the whole amount of principal and interest outstanding become due upon default in payment of any agreed instalment is one which is "thoroughly understood by money-lenders," it having been "their mainstay for many years" (*i*). The chief importance of this clause for the purposes of the Act lies in the circumstance that it may not have been sufficiently understood by the borrower. *Levene* v. *Greenwood* (*k*) affords an illustration of a case in which a transaction was re-opened on the ground that the money-lender had not sufficiently

(*h*) [1906] 1 K. B. 79.
(*i*) CHANNELL, J., in *Levene* v. *Greenwood*, 20 T. L. R. 389.
(*k*) 20 T. L. R. 389.

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brought to the attention of the borrower the nature and effect of the default clause.

An attempt was made to re-open the transaction in *Carringtons, Ld.* v. *Smith* (*l*) on this ground, but in that case the attempt failed. Inasmuch as CHANNELL, J., decided both these cases, it appears to the writer that the best way of presenting the point to the reader is to place before him the two judgments, so far as they deal with this topic.

In *Levene* v. *Greenwood* CHANNELL, J., is thus reported :—

> "Then came a fact which, he thought, although he had some doubt, altered the case. By the terms of the bargain the money was repayable in four monthly instalments, and in the event of any one instalment being unpaid the whole balance of the loan remaining unpaid became payable. The defendant, as he admitted, understood that the principal became due, but he did not understand that if he had failed to pay his first instalment the result would be that, instead of paying 50*l.* for the loan for 200*l.* for four months, he would pay 50*l.* for the loan for one month only. That transaction, which was difficult for anyone to understand, had the effect of about trebling the rate of interest. Money-lenders, of course, thoroughly understood the effect of that clause, which had been their mainstay for many years. In his opinion a case such as that, where one party thoroughly understood the effect of a bargain and did not explain the bargain to the other party ignorant of the effect (*m*), came within the section."

The learned Judge accordingly relieved the defendant of all interest in excess of 2*s.* in the pound per month, which he had agreed to pay.

(*l*) [1906] 1 K. B. 79.

(*m*) It is submitted that these words should be understood "ignorant of the effect *to the knowledge of the money-lender*." The money-lender must, it is submitted, either know that the borrower does not understand, or at least be responsible in some way for the borrower's ignorance.

In *Carringtons, Ld.* v. *Smith* (*n*) the learned Judge said:—

"I next come to a decision of my own, *Levene* v. *Greenwood*, which has been followed in Ireland by the LORD CHIEF JUSTICE in a case of *Wells* v. *Joyce* ([1905] 2 Ir. Rep. 134). I there held that a default clause understood by the lender, but not understood by the borrower, made the transaction harsh and unconscionable. To that I quite adhere. There may be some difficulty about the word 'harsh,' but 'unconscionable' seems to me to quite hit that case. Amongst the very things that the Act does mean to hit, and I think does effectually hit, are the money-lending traps for the unwary. I should not hold 60 per cent. per annum to be of itself necessarily excessive or harsh or unconscionable, though of course circumstances might easily make it so, nor should I hold interest of 1*s.* in the pound per month (which is, of course, 60 per cent. per annum) to be necessarily so either; but if I found that the interest was put into the shape of 1*s.* in the pound per month in order to disguise it, and that in fact the borrower had not appreciated it, I should then hold that the interest was both excessive and harsh and unconscionable. In the present case there was a default clause, but I think the defendant quite understood and appreciated it. He was clearly confident in his ability to pay and that he would not make default, and when this clause was under discussion what he said in substance was that he was more likely to want to pay before it was due than to get into arrear, and wanted to know what reduction would be made in that case. I would also point out that the Money-lenders Act does not, as the Bills of Sale Act, 1882, did, require that the interest should be rateable interest. When a loan is to be for an indefinite time, of course the rate of interest is all-important, but where the loan is for a definite period, repayable by instalments or otherwise, I do not think that the borrower generally cares very much what the rate of

(*n*) [1906] 1 K. B. 79.

SECT. 1, SUB-SECT. (1).

interest on the amount from time to time outstanding as his instalments are paid works out at. What he does want to know is how much he is to pay for getting the accommodation which he asks, and when a person of intelligence and business habits ascertains and understands that, I am not sure that it is very material whether he understands the real rate per annum of the interest or not. Assuming, however, that he is willing to pay the sum asked of him for the loan for a year, he probably will not be willing to pay that sum for the loan for a month only, and consequently a default clause not understood is, in my opinion, a trap."

The learned Judge in this case was satisfied that the defendant did understand the default clause, and accordingly refused relief (*o*).

OF THE DISTINCTION BETWEEN FIRST TRANSACTIONS AND RENEWALS.

In several respects in considering whether the interest charged is excessive, and whether, if so, the transaction is harsh and unconscionable, it may be material to consider whether the transaction under consideration is a first transaction or a renewal. If it is a renewal it may be either a "simple" or a "compound" renewal (*p*). By a *simple* renewal is meant a renewal which is not complicated by being associated with a further advance. By a *compound* renewal is meant a renewal where there is a fresh advance, and the consideration for the new debt

(*o*) In an unreported case of *Samuel* v. *Elliott*, heard by the same learned Judge on the 2nd December, 1905, in which one of the writers was of counsel for the plaintiff, the default clause was again relied upon as a ground for relief, but the learned Judge found as a fact that the borrower sufficiently understood the nature and effect of the clause, although he had not made any calculation as to the precise effect of it upon the rate of interest payable for the loan in the event of it coming into operation, and relief was accordingly refused.

(*p*) The author of "The Law of Money-lending, Past and Present" is responsible for this terminology.

created by the operation consists in part of a balance of a former debt and in part of a fresh advance. A common feature of compound renewals is that the balance of the old debt is cancelled and treated as being freshly advanced, such balance being added to the fresh cash advance, and interest being charged afresh upon the aggregate sum so arrived at. By this method, which is much in vogue amongst money-lenders, interest is charged upon interest, and the borrower's indebtedness goes up by leaps and bounds. KEKEWICH, J., used to liken this operation to the rolling of a snowball.

There is this very material difference between a first transaction and a renewal, that in the case of a first transaction the borrower, if he does not like the money-lender's terms, is usually more or less free to go elsewhere, and is generally in a position to bargain with the money-lender on terms of some sort of equality, though it may be questioned how far a man in need of money can be said to be ever in a position to bargain on equal terms with the man who has it to lend. In cases of renewals there is, of necessity, greater disparity between them. The money-lender is the borrower's creditor, and in a position to exert more or less pressure upon him. The borrower is, moreover, not always in as favourable a position to borrow money elsewhere as he formerly was, for if it should have become known to other money-lenders that he has already borrowed of a money-lender he might find, upon applying elsewhere for a loan, that his credit was impaired, and that money was "tighter" than of yore.

In the case of a compound renewal, there is the same disparity between the lender and the borrower as in a simple renewal, but the compound renewal involves the charging of interest upon interest, which renders it much more likely than a simple renewal to exhibit an instance of excessive interest and a harsh and unconscionable bargain.

SECT. 1, SUB-SECT. (1).

In "The Law of Money-lending, Past and Present," the author of that work offered certain observations upon first transactions and renewals which have not been accepted by the Bench, and have been adversely criticised (in private) by more than one member of the Bar. They will be found in the footnote below (*q*).

Samuel v. *Burton* (*r*) affords almost a solitary instance

(*q*) (4) *Distinction between First Transactions and Renewals.*

This distinction does not seem as yet to have been brought by the decisions under the Act into such prominence as in the opinion of the writer it deserves to occupy.

In the case of unsecured loans, in the first transaction the lender risks his money; and it is this fact, and this fact alone, which justifies him in demanding a high rate of interest. The interest which is paid for the accommodation is not merely a payment made for the use of the money, as it is in the case of loans which are adequately secured; in a great measure it is a sum which is charged by the money-lender as a premium against risk of loss of the principal. But upon *a simple renewal* the money-lender risks nothing. His money is already fully risked, and a renewal merely amounts to giving the borrower so much further time in which to pay. The money-lender, certainly, runs the additional risk that the position of the borrower may go from bad to worse during the period of renewal, but against this he may derive benefit from the borrower being tided over a difficult time, and being in an improved position at the expiration of the renewal period. Probably, if the average of a sufficient number of instances could be taken, the one consideration would be found to practically balance the other. Putting out of account, therefore, any question of increased risk, all that a lender is fairly entitled to demand upon a renewal is a fair interest for the use of his money during the renewal period.

In the case of a *compound renewal* (if the writer may be permitted to coin that phrase)—by which is meant a renewal in respect of the unpaid balance of a loan coupled with a fresh advance—the only money which the lender puts at risk is the amount of the fresh advance. The writer ventures to suggest that where transactions are re-opened which have involved simple renewals at high rates of interest, as though they had been original loans, a principle which might with justice be adopted would be to allow interest on such renewals at a rate very much less than upon the original advances—say upon a basis of from 5 to 10 per cent. only.

In the case of a compound renewal so much of the former loan as was carried forward might thus be treated upon the suggested renewal basis, whilst so much as represented a fresh advance might be justly allowed to carry interest at the same rate as may be allowed in respect of the original advance.

(*r*) App. F.

(so far as the writers' knowledge extends) of a series of compound renewals being upheld.

In *Fieldings* v. *Pawson* (*s*), the cash in form advanced to the principal debtor at the time of the transaction was 2,360*l.* But 373*l.* of this was at once repaid, as previously arranged, in settlement of a balance owing from the principal to the plaintiffs in respect of a previous advance. The defendant, whose case was alone under consideration, had not been a surety for, nor concerned in, the former transaction. The Court of Appeal treated the amount advanced as between plaintiff and this defendant as the full 2,360*l.*

The LORD CHIEF JUSTICE, upon this point, said:—

> "It is said that we ought to deal with this matter as though plaintiff advanced a sum of 1,987*l.* only. That I do not think. I think we ought to take this transaction as it stood, and inasmuch as there was paid to Mr. Pawson" (the principal debtor) "and by him returned to the plaintiffs the sum of 373*l.* for a previous debt, and there was a sum of 1,987*l.* cash advanced, I think we ought to take the money at 2,360*l.* as advanced. I desire to point out that, in that respect, I am not acting at all harshly towards the money-lender. I can well conceive that a considerable portion of that 373*l.* did not represent actual cash, but I do not think we ought to be particular in these matters. I think we ought to make people responsible to a certain extent for what they have done, and I think that it is not unfair to this defendant to say that the money advanced must be taken at the sum of 2,360*l.*"

Several cases in which relief has been granted, where there had been compound renewals, will be found in the Digest of Cases (*t*). Cases in which compound renewals have stood the test of judicial examination, so far as the knowledge of the writers is concerned, have been few and far between.

(*s*) App. G.
(*t*) App. H.

SECT. 1, SUB-SECT. (1).

ANALOGY OF SALVAGE AGREEMENTS IN ADMIRALTY.

Upon the question whether a transaction is harsh and unconscionable, it appears to the writers that a striking analogy is presented by the question which frequently arises in Courts of Admiralty, whether a salvage agreement made at sea ought to be enforced as a just and equitable agreement or ought to be disregarded as being "inequitable, extortionate, and unreasonable" (*u*); "manifestly unfair and unjust" (*x*); "grossly exorbitant and totally contrary to the equity of the case" (*y*); or "an outrageous bargain" (*z*).

The importance of regarding the agreement come to as *primâ facie* fair is recognised in the Admiralty Court, and it is submitted that the following passage taken from "The Law of Civil Salvage," by Lord Justice KENNEDY (2nd ed., p. 232), is equally applicable to contracts of money-lending.

The learned author says :—

> "An agreement is *primâ facie* strong evidence of what is fair, because, in the absence of evidence to the contrary, it may be taken to be that which the parties who were most interested, and best able to judge, thought at the time to be fair. But if, on examination of the facts, it appears that there was no fraud or deceit in the transaction, yet one of the parties was, when he made the agreement, in such straits that he was practically compelled to accept such terms as the other party might dictate, and that other party used his opportunity to dictate them, it is obvious that the value of the agreement, as evidence of what was fair, is entirely taken away" (*a*).

(*u*) *The Port Caledonia and The Anna*, [1903] P. 184.
(*x*) *Akerblom* v. *Price*, 7 Q. B. D. 132.
(*y*) *The Helen and George*, Swab. 368, at p. 369.
(*z*) *The Crusader*, [1907] P. 22.
(*a*) CHANNELL, J., in *Carringtons, Ld.* v. *Smith*, [1906] 1 K. B. 79, made some remarks very similar to this passage in effect.

The compulsive stress of circumstances upon a master of a vessel in need of assistance to accept the terms pressed upon him by the salvor may frequently be greater than the compulsive stress of circumstances upon a borrower to accept the terms pressed upon him by the money-lender, for the reason that a borrower may in some sort be free to apply elsewhere, whilst there may be no other salvor available for a master of a ship in difficulties to have recourse to; but whilst, on the one hand, in salvage cases, the circumstance that the master of the salved ship might have had an opportunity to seek help from others will not be sufficient to support a manifestly unfair and unjust agreement, so, on the other hand, money-lending cases may, and frequently do, occur in which a borrower, though theoretically able to go elsewhere if the terms were not to his liking, had practically no choice, but was bound to take the money of the particular lender with whom the bargain was made.

In each case the parallel is exact on the one side, for just as the money-lender is free to withhold his money unless the borrower agrees to his terms, so a salvor is free to withhold his services unless the master of the vessel in distress agrees to the terms of salvage remuneration insisted upon. In each case the risk run by the money-lender or the salvor, as the case may be, and the compulsive stress of circumstances as affecting the borrower or the shipmaster, are circumstances to be had regard to.

The following extracts from judgments in cases in the Admiralty illustrate the principles upon which Courts of Admiralty deal with salvage agreements:—

BRETT, J.A., in *The Medina* (*b*), said:—

> "I think the old rule of the Admiralty Court ought not to be lightly encroached upon, viz., that where there is an

(*b*) 2 P. D. 5.

SECT. 1, SUB-SECT. (1).

agreement made by competent persons and there is no misrepresentation of facts, the agreement ought to be upheld, unless there is something very strong to show that it is inequitable."

BUTT, J., in *The Mark Lane* (*e*), said:—

"In the cases referred to by counsel, the word 'inequitable' has been used. But I think what is at the root of the question is this—where it is found that a wholly unreasonable price has been insisted on by the salvors and an agreement incorporating it has been signed, the Court looks rather to the position of the parties than to the reasonableness or unreasonableness of the amount. Were the parties in fact contracting on equal terms? It is clear that, in the present case, they were not. It is true there is not in this case the amount of duress which would invalidate an agreement at common law; but in this Court the same amount of compulsion or duress—call it what you will—is not necessary to induce the Court to refuse to enforce an agreement. The captain of the *Crete* appears to have said, though not in so many words: 'If you do not sign this agreement to pay 5,000*l.*, I will leave you.' His manner and demeanour were such that they led the captain of the *Mark Lane* to believe that that was what he meant to do, and he has not from first to last said that he would either have taken less or have stayed by the *Mark Lane*. The fact is that the master of the *Mark Lane* signed this agreement under compulsion, and, the amount being exorbitant, I decline to uphold the agreement."

BUCKNILL, J., in *The Port Caledonia and the Anna* (*d*) said:—

"The first question to consider is, What was the position of the two persons who made the agreement? The position was this: One man was in a position to insist upon his terms, and the other man had to put up with it.

(*e*) 15 P. D. 135.
(*d*) [1903] P. 184.

He could not help himself. He says in his letter to his owners: 'He demanded 1,000*l.* to take me away. I offered him 100*l.*, or to leave it to the owners; but he would not agree, so I agreed to give him 1,000*l.* rather than foul the *Anna*.' He appreciated the possibility of fouling the *Anna* if the weather had remained bad, and if the wind had remained in the S.W., neither of which things happened. So he found himself obliged to give way to a person who would not move him, and who would have allowed him and the *Anna* to drift towards the rocks, and who would, I think, have seen them go there without putting a hawser on board unless he got a promise of 1,000*l.* . . . This agreement cannot be allowed to stand, and I set it aside."

BRETT, L.J., in delivering the judgment of the Court (BRAMWELL, BRETT and COTTON, L.JJ.), in *Akerblom* v. *Price* (*e*), said:—

"The fundamental rule of administration of maritime law in all Courts of maritime jurisdiction is that, whenever the Court is called upon to decide between contending parties upon claims arising with regard to the infinite number of marine casualties, which are generally of so urgent a character that the parties cannot be truly said to be on equal terms as to any agreement they may make with regard to them, the Court will try to discover what in the widest sense of the terms is under the particular circumstances of the particular case fair and just between the parties. If the parties have made no agreement, the Court will decide primarily what is fair and just. . . . If the parties have made an agreement, the Court will enforce it, unless it be manifestly unfair and unjust; but if it be manifestly unfair and unjust, the Court will disregard it and decree what is fair and just. This is the great fundamental rule. In order to apply it to particular instances, the Court will consider what fair and reasonable persons in the position of the parties respectively would do or ought to have done under the circumstances."

(*e*) 7 Q. B. D. 129.

SECT. 1, SUB-SECT. (1).

SEVERAL LENDERS ADVANCING MONEY BY WAY OF CO-ADVENTURE.

Where a loan is contributed to by several money-lenders, carrying on distinct businesses, but associated as co-adventurers in the particular transaction, the knowledge of any one of them as to any fact material to the question of relief will be imputed to them all (*f*).

The subject of loans by co-adventurers is also treated in notes to sect. 2 in relation to loans by money-lenders not in their registered names, and the lending of money by money-lenders otherwise than at their registered addresses. It will be seen upon reference to the notes to sect. 2 that that section places great difficulties in the way of several registered money-lenders joining in a loan by way of co-adventure, if, indeed, the section does not render such a transaction legally impossible.

JURISDICTION IN RESPECT OF CONTRACTS MADE ABROAD.

In *Strichand* v. *Lacon* (*g*) the plaintiffs were a firm of money-lenders carrying on business in Poona, in India. The contract had been made in India and was intended to be performed there. The defendant having made default was sued in England, where he was then resident, and set up a claim for relief under the Act. It was contended by the defendant that the Act provided that "where proceedings are taken in any Court" by a money-lender for the recovery of money lent the Court might re-open the transaction, and that as the plaintiff had taken proceedings in England, the *lex fori* applied. RIDLEY, J., overruled this contention and held that the Act had no application to a contract made abroad. The

(*f*) *Saunders* v. *Newbold*, [1905] 1 Ch. 260, at p. 275; and in H. L., *Samuel* v. *Newbold*, [1906] A. C. 461.

(*g*) 22 T. L. R. 245.

law of the place where the contract was made ought to apply in the absence of circumstances indicating a different intention. A defence under the Act was not a matter of procedure, as it went to the merits of the case, and therefore the *lex loci contractus* must apply.

ORDER XIV. AS APPLICABLE TO MONEY-LENDING CASES.

After considerable fluctuations of judicial opinion giving rise to great uncertainty in practice, it has at length been settled by the Court of Appeal in *Lazarus* v. *Smith* (*h*) that where a money-lender plaintiff applies for leave to sign final judgment under Order XIV., and the defendant, having no other defence, claims relief under the Money-lenders Act, alleging that the interest is excessive and the transaction harsh and unconscionable, or otherwise such as a Court of Equity would relieve against, but admits that he has not repaid the whole of the money actually advanced, the proper order is to order summary judgment for the amount admitted to be due without interest, and to give leave to defend for the residue of the claim.

The judgments in *Lazarus* v. *Smith* are expressed in terms applicable only to a case in which the defendant, in his affidavit, clearly *admits* that after taking credit for any payments which he has made, a certain sum, balance of the amount actually advanced, still remains owing to the money-lender. But it is submitted that no distinction can be drawn in practice between cases in which the defendant admits the fact in terms in his affidavit, or personally or by his counsel or solicitor before the Master, and cases in which the fact is positively sworn to on behalf of the plaintiff and not denied by the defendant. It is submitted, therefore, that in both classes of case the principle of *Lazarus* v. *Smith*

(*h*) [1908] 2 K. B. 266.

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applies, more especially because the practice (which was of recent introduction) of giving unconditional leave to defend in cases in which the defendant having no other defence claimed relief under the Act, notwithstanding that it clearly appeared that, after giving credit for all repayments made by the borrower, a balance of the amount actually advanced remained owing, was, in the submission of the writers, based upon a misunderstanding of the case of *Wells* v. *Allott* (*i*). In view of the fact that the judgments in *Lazarus* v. *Smith* are limited so far as their actual language is concerned to cases in which the defendant expressly admits a balance of the amount advanced to be owing, it may be well to give a short account of the fluctuations in the practice which have taken place.

Before *Lazarus* v. *Smith* the ruling case upon Order XIV. in money-lending cases was *Wells* v. *Allott* (*i*). In order to appreciate the precise effect of the judgments of the Court of Appeal, it is necessary to have regard to the facts of that case. So far as material they were as follows:—The claim was by a money-lender upon a promissory note for 70*l*. This note was given in respect of the last of a series of loan transactions, the net result of which was that the plaintiff had advanced to the defendant at various times sums amounting to 150*l*., whilst the defendant had repaid at various times sums amounting to 140*l*. Assuming that the defendant was entitled to have all the series of transactions re-opened, he would owe 10*l*. balance of principal, together with such interest as the Court might allow. Taken at 5 per cent. on the various advances from the dates when they were respectively made, and crediting the repayments made, this interest amounted to 2*l*. 17*s*. 11*d*. The defendant admitted liability for 12*l*. 17*s*. 11*d*., and the Master, under Order XIV., made an order for payment to

(*i*) [1904] 2 K. B. 842.

the plaintiff's solicitors, within four days, of this sum, the plaintiff to sign judgment for that amount; and he gave the defendant leave to defend as to the balance. From this order the plaintiff appealed, and PHILLIMORE, J., in Chambers, considering upon the evidence that the defendant had no case for relief under the Act, gave the plaintiff leave to sign judgment for the full amount of his claim.

The defendant appealed to the Court of Appeal against the order of PHILLIMORE, J., and asked the Court of Appeal to restore the order of the Master. This the Court of Appeal did. The important point to notice is that there was no appeal against the Master's order, and accordingly the decision of the Court of Appeal assumed its propriety, and the judgments do not contain any expression of opinion upon that subject. All that the Court of Appeal did was to reverse the order made by the Judge. The case, therefore, is of no authority whatever upon the question whether the Master's order was a proper one, as MATHEW, L.J., pointed out in the course of the argument in the Court of Appeal of *Dott* v. *Bonnard* (*l*), presently to be referred to.

The point actually decided in *Wells* v. *Allott* may be taken to be that where in an action by a money-lender to recover money lent with interest it appears from the evidence filed on behalf of the defendant (*m*) that there is a case for investigation under the Act, by reason of the high rate of interest charged, or on any other ground (*n*), the case cannot, as regards the claim for interest, be dealt with upon an application for summary judgment under Order XIV., but the action must go to trial for the purpose of having the claim to relief determined. Two points remained uncovered by this decision; one was, Was the Master or Judge in Chambers entitled, in

(*l*) 21 T. L. R. 166.
(*m*) Submitted.
(*n*) Submitted.

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addition to the principal admittedly not repaid, to give the plaintiff leave to sign judgment for even 5*l.* per cent. interest?

The other was, Where there was a *primâ facie* case for relief, could the Master or Judge in Chambers order the action to be put into the short cause list if the defendant objected?

On the first point it cannot be said that *Wells* v. *Allott* is of any direct authority. For the reason already pointed out, the Court of Appeal were not called upon to express any opinion as to the propriety of the Master's order so far as the 2*l.* 17*s.* 11*d.* for interest at 5 per cent. was concerned. Both these unsettled points have been disposed of by *Lazarus* v. *Smith*. An order for summary judgment under Order XIV. may not include any sum whatever for interest, and where leave to defend is given as to the whole or part of plaintiff's claim, the action may, in suitable cases, be put into the short cause list for trial, there being no distinction between money-lending claims and any other sort of specially indorsed claims in this particular respect (*o*).

The only other case known to the writers in which the application of Order XIV. to money-lending cases was considered by the Court of Appeal before *Lazarus* v. *Smith* was *Dott* v. *Bonnard* (*p*). In that case an action was brought by a money-lender (*q*) to recover 1,040*l.*, the amount of two promissory notes. This sum represented 940*l.* principal lent and 100*l.* agreed "cash bonus" with which the defendant, in his affidavit filed in opposition to plaintiff's summons under Order XIV., had no fault to find. But the defendant's case was that the plaintiff had

(*o*) The settlement of both these points is in accordance with the view contended for by the author of "The Law of Money-lending, Past and Present."

(*p*) 21 T. L. R. 166.

(*q*) At this time the plaintiff, Dott, had not been found to be a money-lender, as he afterwards was in *Bonnard* v. *Dott*, but it was admitted for the purposes of argument in the Court of Appeal that he was a money-lender, and the case proceeded upon that footing.

from time to time obtained from him by way of bonuses 1,100 fully paid shares in one company, worth 550*l.*, and 3,700 shares in another company, worth 1,250*l.*, and an undertaking to deliver another block of shares worth over 3,200*l.*—altogether, in one form or another, upwards of 5,000*l.* Two days before plaintiff issued his writ in the King's Bench action, the defendant had commenced an action against the plaintiff in the Chancery Division (*r*), claiming to have all the transactions re-opened, and an account taken of what was fairly due to the plaintiff and an order for the return by the plaintiff of the shares and the delivery up of the undertaking to be cancelled. The Master, in the King's Bench action, made an order giving the defendant leave to defend on bringing 1,040*l.* into Court, and JELF, J., affirmed the Master's order. The defendant appealed to the Court of Appeal. That Court reversed the orders of JELF, J., and the Master, and gave unconditional leave to defend. The learned editor of "The Annual Practice" (1908, p. 127) understands *Dott* v. *Bonnard* as being an authority for the proposition that "where there are special circumstances, as for example where the person sued by the money-lender is taking proceedings elsewhere for relief under the Act, there ought to be unconditional leave to defend." Passing by, for the moment, the question whether a defendant by instituting proceedings in the Chancery Division for relief can evade the operation of Order XIV., the writers do not understand *Dott* v. *Bonnard* as an authority for that proposition. The writers understand the judgments in *Dott* v. *Bonnard* to proceed upon the ground that, in view of the fact that the defendant had handed over to the plaintiff shares by way of bonus which were sworn to be worth 1,800*l.* (being nearly double the value of the 940*l.* principal advanced), it remained to be seen whether, if the plaintiff were ordered to account (*s*) for these shares, it might not turn

(*r*) This was the action *Bonnard* v. *Dott*, already more than once referred to.

(*s*) As he afterwards was.

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out that he had been repaid his principal "in meal if not in malt," and that under all the circumstances of the case it would not be right in any way to prejudge that question.

In *Wells* v. *Allott* there are passages in the judgments of COLLINS, M.R., and COZENS-HARDY, L.J., which, taken by themselves, without reference to the facts of that case, were capable of being understood to mean that cases in which the defendant claimed relief under the Money-lenders Act were not within Order XIV. at all, and that Order XIV. did not apply to money-lending cases. A similar passage is to be found in the judgment of MATHEW, L.J., in *Dott* v. *Bonnard* (*t*).

Accordingly, from the time when these cases were first reported down to the Trinity Sittings, 1907, these *dicta* were constantly cited to the Masters and Judges in Chambers as authorities for the proposition that Order XIV. could not be made use of by money-lenders where relief was claimed under the Act. In the experience of the writers the rulings of the Masters and of the Judges were invariably against this contention until Trinity Sittings, 1907. In Trinity Sittings, 1907, BRAY, J., sitting in Chambers, as the writers are informed, gave unconditional leave to defend in a case in which relief was claimed under the Act, declining to order judgment for the balance remaining unpaid of the amount actually advanced. In the vacation of 1907, PICKFORD, J., the vacation Judge, followed BRAY, J., rather, it is thought, in order to secure uniformity of practice than because he entertained any decided view that the defendant was entitled on principle to unconditional leave to defend in such cases. There being no appeal to the Court of Appeal by a plaintiff from an order giving a defendant unconditional leave to defend, the practice established by BRAY, J., and PICKFORD, J., could not be brought under the consideration of the Court of Appeal. At length

(*t*) 21 T. L. R. 166.

RIDLEY, J., sitting in Chambers, in *Lazarus* v. *Smith* reverted to the former practice, and ordered judgment for the amount of the original advance admittedly not repaid.

The defendant appealed, with the result above mentioned.

The common practice, before Trinity Sittings, 1907, was to debit the defendant with the amount actually advanced, and to credit him against this with all payments actually made by him to the plaintiff whether such payments were made on account of principal, or interest, or bonuses, or charges, and judgment was ordered for the balance thus ascertained. Thus all repayments were for this purpose treated as repayments of principal. Presumably this will be again the practice now that *Lazarus* v. *Smith* has re-established the practice of ordering judgment for the balance remaining due of the amount actually advanced. At first sight it might perhaps be questioned whether the allocation of all the repayments to principal is not open to criticism for the reason that where a sum compounded of principal and interest is payable by instalments, each instalment represents so much for principal and so much for interest, and it might be suggested on behalf of the money-lender, that each repayment ought to be regarded as so much paid on account of principal and so much paid on account of interest, and that, in considering the amount for which judgment should be ordered, the defendant should only have credit for so much of the repayments as represents principal. The propriety of the prevailing practice in this regard, however, cannot be successfully impugned. No other course is possible. Even if there were no more conclusive reason to be adduced in support of the prevailing practice, yet the practical inconvenience of proceeding upon any other plan would almost have compelled its adoption. The ascertainment of the proportions of each repayment, which in strictness represent repayments

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of principal and interest respectively, would involve a complicated calculation in every case, inasmuch as where a sum compounded of principal and interest is payable by instalments of equal amount, spread over a definite period, the proportions of principal and interest are different in the case of each instalment. The first instalment represents a relatively large proportion of interest and a relatively small proportion of principal, whilst each successive instalment represents a larger proportion of principal and a smaller proportion of interest, the last instalment representing a very large proportion of principal and a very small proportion of interest. It would obviously be inexpedient to embarrass Order XIV. proceedings with niceties of this sort. But the decisive reason in favour of maintaining the prevailing system is that any attempt to divide the repayments between principal and interest would necessarily have to be based upon one or other of two hypotheses. Either it must be assumed that the contract is enforceable in its entirety, or it must be assumed that the Judge may grant relief. If the Master were to proceed upon Order XIV. upon the footing that the contract is enforceable in its integrity, he would be begging the question, and would proceed upon an assumption which he would have no right to make. If, on the other hand, it were to be assumed that relief would be granted, the Master would have no means whatever of forecasting the terms upon which relief would be granted. Consequently the only practicable course on Order XIV. is the course which prevails, and which assumes as a possibility that the money-lender may fail to make good his claim to anything more than his bare principal, in which event, of course, the allocation of all repayments to that principal is the necessary consequence. There remains one very important question touching procedure under Order XIV. which calls for discussion. It is:—

Order XIV. in Relation to the Default Clause.—Sect. 1,

sub-sect. (1) empowers the Court to "set aside, either wholly *or in part*, or *revise*, or *alter*, any security given or agreement made in respect of money lent by the money-lender."

In the overwhelming majority of cases money-lenders take from borrowers promissory notes for payment of the sum agreed upon, by certain instalments, such promissory notes containing a clause commonly called "the default clause," by which it is stipulated that upon default being made in payment of any one instalment the whole balance secured by the promissory note shall at once become due and payable.

More often than not default will have been made, and the specially indorsed writ will allege that default has been made, and Order XIV. will be set in motion for the purpose of enforcing the default clause and recovering the whole balance secured by the note.

The question arises whether the money-lender, in such a case, can obtain judgment under Order XIV. for any sum in respect of which he has to rely upon the default clause in order to entitle himself to recover? or whether Order XIV. can only be used to get judgment for the amount of such instalments as may have become due before the issue of the writ, without regard to the operation of the default clause?

In view of the clear language of sect. 1, sub-sect. (1), it would seem not possible to dispute the proposition that in an action upon a promissory note containing a default clause the Judge might "revise or alter the security given" by striking out the default clause, leaving the rest of the promissory note standing. In view of *Wells* v. *Allott* (*u*), *Dott* v. *Bonnard* (*x*), and *Lazarus* v. *Smith* (*y*), it cannot be gainsaid that neither Master nor Judge in Chambers has any jurisdiction to grant or to withhold relief under

(*u*) [1904] 2 K. B. 842.
(*x*) 21 T. L. R. 166.
(*y*) [1908] 2 K. B. 266.

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the Act. But if upon Order XIV. the Master or Judge gives effect to the default clause by ordering judgment for a sum to which plaintiff can entitle himself only by means of the default clause, is he not thereby in effect deciding that the defendant is not entitled to be relieved against the default clause by having it struck out by the Judge at the trial?

It is within the knowledge of the writers that a difference of opinion exists, or has recently existed, amongst the Masters upon this question. It is not known whether the question has been brought before the Judge in Chambers.

The writers submit that a money-lender plaintiff ought not to be permitted to obtain an order for judgment under Order XIV. for any sum which he can only claim as due by virtue of the operation of the default clause, in any case where the defendant by his affidavit sets up a claim to be relieved against the operation of that clause.

The Act has only been considered in this note hitherto, in so far as it affords defendants a right to be relieved against harsh and unconscionable bargains. Except in cases where a defendant sets up that he has already repaid to the money-lender the amount borrowed with reasonable interest, and that he is therefore not indebted to the money-lender in any sum whatever, a claim to relief upon the ground that the impugned transaction is harsh and unconscionable does not go to the whole of the plaintiff's claim, but merely goes to moderate and abate it.

But there is a class of cases in which the Act affords a defence to the whole of the plaintiff's claim, irrespective of any question of repayments: cases where the defence is rested upon the alleged illegality of the transaction; *e.g.*, that the plaintiff was not duly registered as a money-lender, or that the transaction was not carried out in some other respect conformably to the provisions of the Act. In such cases, of course, the only possible order which

can be made upon Order XIV., if a *primâ facie* defence is made out by defendant, is to give the defendant leave to defend as to the whole amount claimed.

The writers submit the following propositions relative to the subject-matter of this note:—

PROP. I. Where a defendant by his affidavit shows a *primâ facie* claim to relief under the Act against plaintiff's claim, upon the ground that the interest is excessive, and the transaction harsh or unconscionable, or otherwise such as a Court of Equity would relieve against, neither the Master nor the Judge in Chambers has any right to adjudicate upon any part of the plaintiff's claim against which it is possible that defendant may establish his right to be relieved. It is the Judge at the trial who, alone, can exercise the jurisdiction conferred by the Act (*z*).

PROP. II. Where it is admitted by defendant, or [submitted:—deposed to on behalf of plaintiff and not denied by defendant] that after he is credited with all payments made by him against the principal money actually advanced by plaintiff, plaintiff is entitled [submitted:—subject to Prop. IV.] to an order for judgment for the balance of such principal, but without any interest, defendant being given unconditional leave to defend as to the balance of plaintiff's claim (*a*).

PROP. III. In ascertaining the balance for which plaintiff is entitled to judgment under Prop. II. all payments which have been made by defendant to plaintiff are to be reckoned as having been made by way of repayment of principal. If any shares or securities or other valuable consideration other than money have been transferred or delivered or given by the borrower to the money-lender by way of bonus or otherwise in relation to the loan, and defendant claims that any should be taken into account, the full value of such shares, securities, or other valuable

(*z*) *Wells* v. *Allott*, [1904] 2 K. B. 842.
(*a*) *Lazarus* v. *Smith*, [1908] 2 K. B. 266.

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consideration, must be treated as a repayment of principal for this purpose (*b*).

PROP. IV. [submitted]. Where the plaintiff's right to recover the amount claimed by him depends wholly upon the operation of the default clause, and defendant by his affidavit discloses grounds upon which he might possibly obtain relief from the Judge at the trial against such default clause, and claims to be entitled to such relief, no order can be made for judgment. Where part of plaintiff's claim does not, and part does depend upon the default clause, the proper course in such a case is to give plaintiff judgment for such an amount only as he would have been entitled to under the preceding propositions if the claim indorsed upon the writ had been only for so much as is claimed to have been due at the date of the issue of the writ irrespective of the operation of the default clause.

The subject of mode of trial which generally arises upon leave to defend being given as to the whole or any part of plaintiff's claim, and the subject of Order XIV. so far as it relates to actions pending simultaneously in the Chancery and King's Bench Divisions, is dealt with in the next two notes.

MODE OF TRIAL.

By Order XIV., rule 8 (b) (short cause list), a special list shall be kept for the trial of causes in which the Judge is of opinion that a prolonged trial will not be requisite, and the Judge may, if he think it advisable, order any such action to be put into such list.

By rule 6 of the same Order:—Leave to defend may be given unconditionally, or subject to such terms as to giving security, or time *or mode of trial*, or otherwise, as the Judge may think fit.

By Order XXXVI., rule 6. In any other cause or matter (*i.e.*, any cause or matter other than such as are specially provided for in rules 3, 4, and 5) upon the

(*b*) *Dott* v. *Bonnard*, 21 T. L. R. 166.

application, within ten days after notice of trial has been given, of any party thereto for a trial with a jury of the cause or matter or any issue of fact, an order shall be made for a trial with a jury.

The short cause list is extensively resorted to for the trial of actions by money-lenders against borrowers.

The rules as to juries apply to actions by or against money-lenders equally as to other kinds of actions, but the application of them to money-lending cases involves special considerations which call for notice.

Where the mode of trial is dealt with by a Master under Order XIV., rule 6 of that Order empowers him to give directions as to the mode of trial as a condition of giving leave to defend. If this rule is acted upon, the trial may be ordered to take place before a Judge alone. But if this rule is not acted upon, and either party subsequently applies for the action to be tried by a jury pursuant to Order XXXVI., rule 6, he will be entitled as of right to a jury in accordance with that rule (*c*). The fact that the action has been already ordered to be placed in the short cause list does not affect the question of the right of a defendant to demand a jury. But, of course, *the right to have a trial with a jury does not mean that the party claiming a trial with a jury is entitled to have all the questions which may arise at the trial submitted to the jury.* Assuming, for instance, that the question whether the transaction is harsh and unconscionable is a question for the Judge, and not for the jury (as to which see below), the circumstance that the trial has been ordered to be had with a jury would not entitle the party at whose instance the order for a jury was obtained to have that question left to the jury.

Two questions call for notice in this connection, viz.:

1. Ought the Master in giving leave to defend to make it a condition of such leave under Order XIV., rule 6, that the action shall be tried by a Judge alone if the defendant desires a jury ?

(*c*) *Wolfe* v. *De Braam*, 81 L. T. 533

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2. Where the trial is ordered to be had with a jury, ought the questions whether the interest is excessive, and whether, if so, the transaction is harsh and unconscionable, to be left to the jury?

As the view which the Master, exercising jurisdiction under Order XIV., may take of the second of the above questions, may determine his decision as to whether he should, in giving leave to defend, make it a condition that the trial shall take place by a Judge alone, it is convenient that the second of the above questions should be fully considered.

Now sect. 1, sub-sect. (1), of the Act provides that where . . . . there is evidence which satisfies *the Court* that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges, are excessive, and that in either case the transaction is harsh and unconscionable, or is otherwise such that a Court of Equity would give relief, *the Court* may re-open the transaction, and take an account between the money-lender and the person sued, and may . . . . relieve the person sued from payment of any sum in excess of the sum *adjudged by the Court* to be fairly due in respect of such principal, interest, and charges, as *the Court*, having regard to the risk and all the circumstances, *may adjudge to be reasonable*, &c.

Does "the Court" here mean the Judge exclusively? No one will suggest that the question whether the transaction is such that a Court of Equity would give relief could be left to a jury. Further, the word "adjudge" is inappropriate to a jury. Juries find verdicts; they do not "adjudge." One feels on sure ground, therefore, to this extent, that it is for the Judge, and not for the jury, to decide whether the circumstances are such that a Court of Equity would give relief, and to say whether the transaction shall or shall not be re-opened, and if re-opened, then upon what terms.

In *Burton* v. *The Companies Registration Agency* (*d*), which was tried before BUCKNILL, J., and a jury, the learned Judge left to the jury amongst other questions the questions whether the interest was excessive and whether the transaction was harsh and unconscionable. The case afterwards went to the Court of Appeal (*e*), but it was disposed of on other grounds, the members of the Court expressing no opinion upon the propriety of the course adopted by the learned Judge in leaving these questions to the jury.

In *Samuel* v. *Pazolt* (*f*), which was tried before RIDLEY, J., and a jury, that learned Judge held himself bound by the ruling of BUCKNILL, J., in the last-mentioned case, and left the same questions to the jury. The writers, with the greatest respect to BUCKNILL, J., venture to question the propriety of the course taken by him in *Burton* v. *The Companies Registration Agency*, at any rate so far as concerns the question whether the transaction was harsh and unconscionable. This question, they submit, is one of law for the Court, and not one of fact for the jury. The question whether the interest is excessive does not appear to stand quite upon the same footing. The task of forming an estimate as to the amount of interest fairly chargeable, having regard to the risk and to all the circumstances of the case, is a question upon which a jury are quite as well qualified to form an opinion as a Judge. It is rather a question of fact than a question of law. The appreciation of the risk, involving as it must do questions as to the value of securities, and the apparent solvency of borrowers and sureties, and in the case of secured loans the state of the money market at the time, would seem to be very proper for the consideration of a jury. The writers accordingly are not prepared to challenge the ruling of the learned Judge

(*d*) 23 T. L. R. 151.
(*e*) 23 T. L. R. 337.
(*f*) 23 T. L. R. 622.

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that the question whether the interest was excessive is proper to be left to the jury.

They do, however, venture to challenge the ruling of the learned Judge as to the question whether the transaction was harsh and unconscionable. This, it is respectfully submitted, is a question for the Judge alone.

Mere excess of interest will not suffice to re-open a transaction. The question whether the interest was so excessive as to lead to the inference that the transaction was harsh and unconscionable involves considerations more proper for a Judge than for a jury. It bears a strong analogy to the equitable jurisdiction to decree rescission of contracts, which is always a matter for a Judge, and not for the jury. Indeed, it is one of the matters specially assigned by sect. 34 of the Judicature Act, 1873, to the Chancery Division.

The question would also appear to bear a close analogy to the question whether a covenant in restraint of trade is wider than is necessary for the reasonable (*g*) protection of the covenantee. This is a question for the Judge, and not for the jury (*h*).

The question of reasonable and probable cause in malicious prosecution is for the Judge, and not for the jury (*i*), as also is the question in false imprisonment whether the defendant had reasonable ground for suspecting that the plaintiff had been guilty of the felony upon suspicion of which he was arrested (*k*).

In all these cases, although the question of reasonableness is for the Judge, yet any questions of fact which may be in controversy, upon which the question of reasonableness depends, must be left to the jury.

(*g*) It will be remembered that "unconscionable" means "unreasonable and not in accordance with the ordinary rules of fair dealing": Lord MACNAGHTEN in *Samuel* v. *Newbold*, [1906] A. C. at p. 470.

(*h*) *Mallan* v. *May*, 11 M. & W. 653; *Tallis* v. *Tallis*, 1 E. & B. 391; *Dowden* v. *Pook*, [1904] 1 K. B. 45.

(*i*) *Panton* v. *Williams*, 2 Q. B. 169; *Lister* v. *Perryman*, L. R. 4 H. L. 521.

(*k*) *Hailes* v. *Marks*, 7 H. & N. 56.

In submitting, therefore, that the question of harshness and unconscionableness is for the Judge, and not for the jury, the writers in no way question the propriety of leaving to the jury all questions of fact necessary to be determined in order to inform the Judge's mind, and guide his discretion in ruling upon the main question.

To advert once again to the language of the section, it is to be observed that the close association of the words "harsh and unconscionable" with the words "or is otherwise such that a Court of Equity would give relief" seems to be strongly in favour of the view that harshness and unconscionableness is for the Judge alone.

Until this question has been discussed in the Court of Appeal Masters in Chambers dealing with money-lending actions under Order XIV., being requested by the defendant to order the trial to be had with a jury, will doubtless accept the ruling of BUCKNILL, J., as decisive upon the legal position. Ought then a Master, in giving leave to defend, to exercise his jurisdiction under Order XIV., rule 6, adversely to the wish of the defendant desirous of having a jury?

If a defendant shows grounds entitling him to leave to defend the action unconditional in other respects, it seems strange that he should be subjected to terms forcing him to accept a mode of trial different from that to which he would have been entitled had not the plaintiff had recourse (unjustifiably (*l*), as proved by the event) to Order XIV.!

OF ACTIONS PROCEEDING CONCURRENTLY BY THE MONEY-LENDER AGAINST THE BORROWER IN THE KING'S BENCH DIVISION AND BY THE BORROWER AGAINST THE MONEY-LENDER IN THE CHANCERY DIVISION.

It is of frequent occurrence that cross actions are instituted by the money-lender and the borrower against

(*l*) At least in cases where leave to defend is given as to the whole of the plaintiff's claim.

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each other, the money-lender suing the borrower in the King's Bench Division to recover the amount which he claims to be due to him and the borrower suing the money-lender in the Chancery Division claiming the re-opening of the transaction, and perhaps the re-opening of a series of transactions leading up to and culminating in the transaction which is the subject of the King's Bench action, and claiming that an account be taken of all the dealings which have taken place between the parties, and either submitting to pay what may be found to be justly due, or, as the case may be, claiming repayment by the money-lender of the excess.

In this state of affairs the question arises, What is to be done?

Obviously there are three courses possibly open:

1. To allow both actions to go on;

2. To stay one of the actions until the other has been heard;

3. To transfer one of the actions to the division in which the other action is proceeding with a view to their being consolidated, or coming on for trial at the same time before the same Judge.

Considerations of justice and convenience will determine the course to be taken in any particular case, but certain general observations may be made which may be usefully borne in mind in considering the course to take in any particular case.

Where there is an action pending in one division of the Court in which the defendant can obtain all the relief to which he may be entitled, it is *primâ facie* an abuse for him to commence an action claiming such relief in another division of the Court. Unless the plaintiff in the second action, defendant in the first action, can satisfy the Court in which the second action is commenced that there is some good reason why such second action should be allowed to go on, the second action will probably be stayed at the instance of the defendant. In so

far as this is the rule which is applicable, the action to be stayed will be the one commenced last. Technically each division of the High Court has jurisdiction to grant all the relief which could be granted by any other division, but just as the Chancery or King's Bench Division would not entertain Probate or Divorce actions, so there are certain kinds of action so proper to the Chancery Division that the King's Bench Division would recognise the propriety of allowing the litigation to be dealt with in the Chancery Division, and there are also certain kinds of action so peculiarly fit to be dealt with in the King's Bench Division that the Chancery Division would recognise the propriety of the matter being dealt with in the King's Bench Division.

Where, for instance, the transactions between the parties have been numerous and complicated, and particularly where securities have been taken by the money-lender as to which questions of the right of redemption may arise, or where it is claimed that past transactions should be re-opened, and securities taken set aside, and an account taken between the parties from the beginning of their dealings together, a claim to such relief would be more properly brought by action in the Chancery Division than in the King's Bench for the following reasons:—

(*a*) Because the redemption of mortgages, and the setting aside of deeds and other written instruments, and the taking of accounts are peculiarly the subjects of Chancery jurisdiction, being, indeed, amongst the matters assigned to that division by sect. 34 of the Judicature Act, 1873;

(*b*) Because the King's Bench Division has not the machinery for taking long and complicated accounts.

Accordingly, where the money-lender brings an action in the King's Bench claiming, *e.g.*, the amount of a promissory note as being due from the borrower, and the borrower claims to re-open not only that particular transaction, but a series of transactions leading up to and

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including the note in question, and to have a thorough-going account taken of all his dealings with the money-lender, he might be fully entitled and well advised, instead of counter-claiming in the King's Bench Division, to commence an action in the Chancery Division claiming the desired relief. It is thought that in such a case the Chancery Division would be unlikely to stay the Chancery action at the instance of the money-lender. Indeed, the writers conceive that cases might well arise in which, there being a strong *primâ facie* right to relief against the promissory note sued upon, and such note forming one only of a series of transactions which the borrower in the Chancery Division claims to re-open, the action to be stayed might be the King's Bench action, although it might happen to be the action first commenced.

Conversely, where an action is first commenced by the debtor in the Chancery Division claiming relief against an isolated transaction, it is submitted that the money-lender might be fully entitled and well advised to issue a specially indorsed writ in the King's Bench Division claiming payment of the amount of his promissory note or other security, instead of counter-claiming for payment in the Chancery Division. The reason of this is that the special procedure of Order XIV. is peculiarly appropriate to the King's Bench Division, and is applicable to liquidated claims; and even if the debtor can make out a claim to be relieved to some extent against the money-lender's claim, yet unless his claim to relief goes to the whole amount, it would be absurd that a debtor, by hurrying off to the Chancery Division and issuing a writ for relief and an account, could deprive his creditor of the advantage of proceeding under Order XIV. In cases where, *e.g.*, fraud or forgery was alleged, the fitness of such issues to be tried by a jury would also afford a strong reason for preferring the King's Bench Division. In the writers' experience, in cases in which the debtor's Chancery writ was first issued, and afterwards the money-

lender issued a specially indorsed writ in the King's Bench Division, and the borrower applied to stay the King's Bench action, and the money-lender at the same time proceeded under Order XIV., orders have been made under Order XIV. for judgment for the balance remaining owing of the amount actually advanced, as to which there could be no possible defence, and giving leave to defend as to the balance, the action either being stayed as to such balance pending the trial of the Chancery action, or ordered to be transferred to the Chancery Division with a view to its being consolidated with the action there pending.

If, however, the borrower's claim to relief in the Chancery action first commenced involves the investigation of former transactions, with the possible result of wiping out the whole of the money-lender's claim upon the promissory note sued upon in the King's Bench action, recourse by the money-lender to Order XIV. might well be considered to be an abuse of the process of the Court; and in such a case the King's Bench action would probably be stayed, the only justification for it being brought (*i.e.*, the right to have recourse to Order XIV.) being displaced.

If both actions should go to trial, and the relief claimed in that action which is first tried is co-extensive with the relief claimed in the other action, the decision in the action first tried will dispose of the whole matter in litigation between the parties, except the costs incurred to date in the other action, which will remain to be disposed of by the division in which such action is pending.

If in the action which is first tried the relief claimed is not co-extensive with the relief claimed in the other action (as may well happen if the action which is first tried is in the King's Bench Division, and there is no counter-claim), care must be taken so to frame the judgment pronounced, or order made, as not to prejudice any question remaining to be decided in the other action.

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In *Rechnitzer* v. *Samuel* (*m*) the money-lender had issued a specially indorsed writ in the King's Bench Division upon a promissory note. A few days afterwards the borrower commenced an action in the Chancery Division in which he claimed that various money-lending transactions between himself and the money-lender, including the transaction which was the subject of the King's Bench action, should be re-opened, and asked for an account. The money-lender thereupon moved that the Chancery action be dismissed on the ground that it was an abuse of the process of the Court, or stayed pending the decision of the King's Bench action, upon the ground that it was competent to the borrower in the King's Bench Division to obtain by means of a counter-claim all the relief claimed in the Chancery action.

BUCKLEY, J., whilst saying that if the money-lender had made an application to transfer the Chancery action to the King's Bench Division he did not know what might have happened, dismissed the motion with costs.

The learned Judge in the course of his judgment (the full report of which deserves attention) said:—

> "I take it for granted, whether it is tried in this division or in the King's Bench Division, that justice will be done as between the parties. At the same time I think I ought to add this, that under sect. 34, sub-sect. (3), of the Judicature Act, there is assigned to the Chancery Division, amongst other things, the dissolution of partnerships or the taking of partnership or other accounts. The High Court of Chancery has for centuries been very familiar with the taking of accounts, and, without saying at all that the King's Bench Division may not be just as competent to take an account as the Chancery Division, it is the fact that there is here the machinery for the taking an account in the sense of investigating figures and vouching items, and so on, which does not exist in the King's Bench Division, and to that small extent I should rather

(*m*) 95 L. T. 75.

lean in an action on accounts to keeping it in the Chancery Division rather than sending it to the King's Bench Division. But, except in that sense, I repeat I have no sympathy with either party. Now, it is to be borne in mind that when the application was before me, being, as it was, an application that the Chancery action be dismissed, or, in the alternative, that it be stayed until after the trial in the King's Bench action, I had no power at all to bring the two actions together. The only thing I could do was to deal with the action before me, and leave the King's Bench Division, of course, to deal with the action before it. I suggested then that the most reasonable course for the litigants to take was to bring the two actions together in some way or other, either here or there, I did not care which, and when they had come together, an application could then be made to such Judge as would then have the control of both of them, and I have no doubt the proper thing then would be an order to consolidate the two actions, and I think the plaintiff in the consolidated action would properly be the plaintiff in the Chancery action. I will just say why that is my opinion. In the common law action there is nothing whatever for the plaintiff to do except to put in the promissory note, to prove the defendant's signature if it were disputed (which it is not), and ask for judgment. That is the end of his case. The defendant in the King's Bench action, the plaintiff in the Chancery action, has all the onus of the case on him. It is for him to prove that his opponents are money-lenders within the Act of Parliament; that they have so dealt with him as that under the Act of Parliament he will be entitled to the special remedies which are allowed by the Act of Parliament, and so on. He is the person upon whom the onus entirely rests, and if the two actions could be brought, as I could not bring them, together, it seems to me the right order would be to consolidate the two, and make the borrower the plaintiff in the consolidated action. Now, the utmost that I could do towards the achievement of that object was to follow what is laid down in *Thomson* v. *South-*

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Eastern Railway Company (*n*), and proceed upon this footing, that priority in point of date, which lies with the money-lenders in this case, is a material, and not a conclusive, test; that the superior test is to see upon whom does the burden of proof lie, and allow the action to proceed in which the person upon whom the burden lies is plaintiff, and leave the other party to put in a counter-claim if he is minded so to do."

In *Magaziner* v. *Samuel* (*o*), JOYCE, J., ordered a stay of proceedings in the Chancery action until after the hearing of the King's Bench action.

(2) Any court in which proceedings might be taken for the recovery of money lent by a money-lender shall have and may at the instance of the borrower or surety or other person liable, exercise the like powers as may be exercised under this section, where proceedings are taken for the recovery of money lent, and the court shall have power, notwithstanding any provision or agreement to the contrary, to entertain any application under this Act by the borrower or surety, or other person liable, notwithstanding that the time for repayment of the loan, or any instalment thereof, may not have arrived.

ACTION BY BORROWER; CHOICE OF TRIBUNAL.

Sub-sect. (1) deals with cases in which the money-lender sues the borrower. This sub-section makes provision for the borrower suing the money-lender.

In the case of an unsecured loan, being an isolated transaction, it will generally be unnecessary for the

(*n*) 9 Q. B. D. 320.

(*o*) *Semble*, somewhat imperfectly noted in Vol. 120 of the Law Times (Journal), 16th December, 1905, p. 152.

borrower to commence an action against the money-lender claiming relief. He may wait until he is sued by the money-lender (most frequently in the King's Bench Division by specially indorsed writ), when he will be able under sub-sect. (1) to raise any claim which he may have to relief by way of defence. More often than not the money-lender will proceed under Order XIV., in which case the borrower will put forward his claim to relief in his affidavit in opposition, and the Master will most commonly direct that there be no pleadings. Assuming, as will generally be the case, that all the material facts intended to be relied upon by the borrower sufficiently appear in his affidavit, no further pleading will be necessary. But if any fact is intended to be relied upon by the borrower as entitling him to relief, or as supporting his claim to be relieved, which is not mentioned in his affidavit (*e.g.* some material fact discovered since leave to defend was given), the borrower would be well advised, generally speaking, to give notice to the money-lender of his intention to rely upon such fact a reasonable time before the trial, otherwise the money-lender may obtain an adjournment upon the ground of surprise, to enable him to answer the case so newly made against him at the trial, for the money-lender will have been justified in preparing for trial relying upon defendant's affidavit as setting up the only defences intended to be relied upon.

But even in the case of a single transaction there may be reasons why a borrower should institute proceedings for relief rather than wait until he is sued. It will be observed that this sub-section enables a borrower to sue for relief, although the time for repayment of the loan may not have arrived. This right may be of great value to the borrower, especially in the case of a secured loan where it may be desired to pay off the money-lender and redeem the security as soon as possible. Unless the borrower sets up fraud, or forgery, or some other

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issue peculiarly fit to be tried by a jury as the ground upon which he claims relief, the proper division of the Court for the borrower to select for his action claiming relief will, speaking generally, be the Chancery Division (*p*). It will be remembered that the redemption of mortgages, the setting aside of deeds and other written instruments, and the taking of [partnership and other] accounts are amongst the matters specially assigned to the Chancery Division by sect. 34 of the Judicature Act, 1873.

Re-opening Past Transactions.—But the borrower may have had previous transactions with the money-lender, and may be desirous not only of claiming relief against the promissory note or other security upon which he is in fact being sued, or upon which he expects that he will, in course of time, be sued, but of having previous transactions also investigated, and if possible re-opened, and a thorough-going account taken as between the money-lender and himself, and of being relieved from liability to make any further payment; nay, more, he may be desirous of going further and claiming repayment from the money-lender of payments which he claims to have made in excess of the amount which, upon an account being taken, the money-lender may be found entitled to retain.

In such a case, if the borrower is first in the field, his choice of tribunal will be dictated by the considerations already discussed. But if the money-lender should be the first to take action, which will most commonly be by specially indorsed writ in the King's Bench Division, the borrower will have two courses open to him. He may counter-claim in the King's Bench action, or he may commence an action in the Chancery Division. Upon this the reader is referred to the last note to sub-sect. (1).

Relief against a Judgment.—The principle that money paid under pressure of legal process could not, in the

(*p*) See judgment of BUCKLEY, J., in *Rechnitzer* v. *Samuel*, 95 L. T. 75.

absence of fraud, be recovered back at law (*q*), has no relation to relief under the Money-lenders Act any more than it had to relief in equity before the Act. CHANNELL, J., in *Samuel* v. *Bell* (*r*), so held. In that case that learned Judge said:—

> "The question arises in this case whether a transaction can be re-opened after payment has been made under the pressure of a writ. Before the Judicature Acts the Court of Chancery used to grant injunctions restraining actions at law, and even proceedings upon judgments which had been recovered at law. Therefore proceedings at law constituted no objection to the exercise of the jurisdiction to give relief in equity. In one case (*s*), which is referred to in the notes to *Chesterfield* v. *Janssen* in White and Tudor's 'Leading Cases in Equity,' relief was given and repayment ordered where the money had been paid in order to avoid a threatened execution. The issue of a writ, therefore, is not a bar to the exercise of the jurisdiction. Indeed, in certain cases the issue of a writ may constitute the very pressure which the jurisdiction is designed to meet."

Accordingly, in *Samuel* v. *Bell*, relief was granted as to a transaction which had been closed by payment made under the pressure of a writ.

The reference, however, to the jurisdiction of the Court of Chancery to give relief even against a judgment obtained at law raises a question of great importance, which is: Whether, since the Judicature Acts, the Chancery Division can relieve against a judgment

(*q*) *Marriott* v. *Hampton*, 7 T. R. 269, and notes thereto, in "Smith's Leading Cases."

(*r*) 22 T. L. R. 118. The passage from the judgment quoted in the text does not appear in the report, but is taken from the note of the judgment taken upon his brief by one of the writers who was of counsel for the plaintiff. Not being taken in shorthand, the precise language is not reproduced, but it may be relied upon as substantially accurate.

(*s*) The learned Judge probably referred to *Curwyn* v. *Milner*, 3 P. Wms. 292 *n*. See also, on this point, the cases referred to in *Harrison* v. *Nettleship*, 2 My. & K. 423.

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obtained in the King's Bench Division. The question will probably present itself for decision at no very distant date.

In the meantime, the writers venture to submit that this question should be answered in the negative.

Before the Judicature Acts all Courts of Law disregarded merely equitable rights, and if the Court of Chancery had treated the judgment of a Court of Common Law as a bar to relief, no relief could have been obtained. For it would have been useless to apply to the Common Law Court to set aside one of its own judgments, regularly obtained, merely on the ground that equitable circumstances existed of which the Court was incompetent to take judicial notice (*t*). The only relief obtainable was in equity, and the circumstance that relief could not be obtained in the Court in which the legal proceedings were proceeding was the reason for the exercise by the Court of Chancery of its special jurisdiction to give relief. Accordingly it was laid down before the Judicature Acts that a Court of Equity had no jurisdiction to relieve a plaintiff against a judgment at law where the case in equity rested upon a ground equally available at law and in equity (*u*).

Sir JOHN LEACH, M.R., said :—

> "A Court of Equity has no jurisdiction to relieve a plaintiff against a judgment at law where the case in equity proceeds upon a ground equally available at law and in equity [unless the plaintiff can establish some special equitable ground for relief]."

The MASTER OF THE ROLLS then referred to three

(*t*) The writers have not overlooked the Common Law Procedure Act, 1854, s. 83, by which equitable defences became pleadable at law, but this only enabled defences to be pleaded which amounted to an unqualified and absolute answer to the action (*Jeffs* v. *Day*, L. R. 1 Q. B. 372). Where the defendant required some modified relief he had still to resort to equity. Moreover, in the view of the writers, sect. 83 of the Common Law Procedure Act, 1854, has no relation to giving relief against judgments.

(*u*) *Harrison* v. *Nettleship*, 2 My. & K. 423.

cases in which equity had relieved against judgments. The writers submit that in each of the three cases referred to the special equity in question could not have been used at law to get rid of the common law judgment, and that the words above enclosed within brackets in the above quoted passage, in order to be applied to the present state of affairs should be read "unless the plaintiff can establish some special equitable ground for relief which he could not have relied upon in the Court in which the judgment was obtained, either as an answer to the action or as a ground for setting aside the judgment."

If this submission is well founded, the case excepted by Sir JOHN LEACH can no longer constitute any exception, for upon application duly made to the King's Bench Division for a new trial or to set aside the judgment, every ground upon which such judgment is impeachable at law or in equity is available to the party.

It was never at any time a ground for equitable interference that a party had not effectually availed himself of a defence at law (*x*).

The writers accordingly submit that a defendant who has allowed judgment to be recovered against him in the King's Bench Division in a case in which he might have relied upon the Money-lenders Act by way of defence, but omitted to do so, cannot go to the Chancery Division for relief, but must apply to the King's Bench Division for a new trial or to set aside the judgment, when the matter will be dealt with by the King's Bench Division in accordance with the principles applicable to the granting of new trials or to the setting aside of judgments, as the case may be (*y*). It is submitted that this question is not affected by sub-sect. (6) of this section.

(*x*) *Simpson* v. *Howden*, 3 My. & Cr. 108; *Ware* v. *Horwood*, 14 Ves. 28; *Bateman* v. *Willes*, 1 Sch. & Lef. 204.

(*y*) See Judicature Act, 1873, s. 24 (5); *Wright* v. *Redgrave*, 11 Ch. D. 24; *In re Artistic Colour, &c., Co.*, 14 Ch. D. at p. 505.

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In *Magaziner* v. *Samuel* (*z*) this subject would seem to have been discussed, but as the judgment in the King's Bench Division had been set aside and the only question was as to whether the Chancery proceedings should be stayed until after the trial of the King's Bench action, the point would seem not to have really arisen for decision.

When the Borrower must Counterclaim (if he does not commence a cross-action) in order to obtain relief.—It is conceived that when there has only been one transaction between the parties, or when the borrower does not intend to claim the re-opening of any past and closed transaction, he need never counter-claim. He can obtain the full benefit of the Act in his *rôle* of defendant, under sub-sect. (1), in any action which the money-lender may commence against him.

But if the borrower should desire to have any past transaction re-opened, then it is submitted that he must either counter-claim in the King's Bench action or commence an action in the Chancery Division.

Moreover, if the transaction which is the subject of the action, *e.g.*, a promissory note sued upon, is so connected with or related to previous transactions that relief even by way of defence cannot be confidently hoped for unless such previous transactions are successfully impeached, he ought, it is submitted, to deliver a counter-claim impugning such previous transactions and claiming relief in respect of them also, although he may not seek any relief *ultrà*, but may desire merely to raise a defence to the plaintiff's present claim.

Generally speaking, pleadings have no place in actions ordered to be put in the short cause list. In *Samuel* v. *Bell* (*a*), which came on as a short cause before CHANNELL, J., the defendant asked to re-open a transaction previous to the promissory note sued upon, which

(*z*) 12th December, 1905. Unreported, but noted Vol. 120, Law Times (Journal) 152.

(*a*) 22 T. L. R. 118.

had, before action, been closed by payment. On objection being taken by counsel for the plaintiff that this could not be permitted, the defendant not having counter-claimed, CHANNELL, J., suggested that the difficulty might be overcome by adjourning the trial, or ordering the actions to be put into the ordinary non-jury list, and in either case giving the defendant leave to file a counter-claim. Upon this, counsel for the plaintiff consented to the action being dealt with as if a counter-claim had been filed claiming relief in respect of the first transaction (*b*). As to the necessity for a counter-claim in order to re-open past transactions, see *Saunders* v. *Newbold* (*c*).

It was argued, unsuccessfully, in *Saunders* v. *Newbold* (*d*), that the words "or other person liable" confined the right to relief to cases in which there remained some pending liability under the transaction sought to be set aside; and that this sub-section ceased to apply when the person claiming relief ceased to be a borrower, and ceased to be under any liability. But the Court of Appeal negatived this contention. *Saunders* v. *Newbold* shows that the Court has power, when re-opening an existing transaction, to re-open also one that is past and closed.

The Court of Appeal in this case said that sub-sect. (2) applies to a case where the loan has been repaid, and that it is not limited to cases in which the money-lender has an unsatisfied cause of action. Given a Court of competent jurisdiction, that Court can exercise under sub-sect. (2), at the instance of the borrower, all the powers which are given to the Court by sub-sect. (1)

(*b*) Plaintiff's counsel requested that this concession might be borne in mind if and when the question of costs should come to be considered. Accordingly, on giving judgment against the plaintiff, CHANNELL, J., in consideration of such concession having been made, refrained from ordering the plaintiff to pay the costs of the successful defendant.

(*c*) [1905] 1 Ch. 260.

(*d*) [1905] 1 Ch. 260. This was not affected by the judgment of the House of Lords on appeal.

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in cases where the proceedings are instituted by the money-lender. One of these powers is to order repayment by the money-lender, and this shows that the word "liable" in sub-sect. (2) cannot be limited in its meaning to "liable in fact." The Court of Appeal further pointed out that the Act is an amending Act, amplifying the powers formerly exercised by the Court of Chancery, and that the Court of Chancery did not allow the fact of repayment to prevent the re-opening of a transaction entered into by a borrower whom the Court deemed from the circumstances of the case unable to protect himself.

The Court also held that relief may be obtained by the borrower, not only when he is sued, but before he is sued.

The Effect of Lapse of Time as a Bar to Relief.—But although *Saunders* v. *Newbold* has established the two following propositions, viz., (1) That where relief is sought in proceedings instituted by a money-lender, the Court has power under sect. 1, sub-sect. (1), to re-open a closed transaction provided it is relevant to or in some way connected with the existing transactions; and (2) that the Court has power under sect. 1, sub-sect. (2), to re-open any past transaction, that case throws no light upon the question what lapse of time, if any, or what circumstances will debar a borrower from suing to re-open a closed transaction not relevant to or in any way connected with any existing transaction. The writers opine that the relief grantable under the Act, being in a great measure discretionary, and being closely analogous to, though not identical with, the relief formerly obtainable in equity, will be administered upon principles as to *laches* as nearly as possible the same as those which obtained in Courts of Equity before the Act. Probably it will be held that no Statute of Limitations applies; but it is submitted that a borrower who intends to claim relief against a closed transaction will be expected to institute proceedings for

relief with due diligence, and will be required, in case of avoidable delay, to give some satisfactory excuse for such delay. In other words, that the Courts will treat the right to relief under the Act as equitable, as distinguished from legal relief, and will grant or withhold relief upon those principles relative to *laches* and delay, which are well established in all cases where purely equitable relief is sought and which find expression in the familiar maxim *Vigilantibus non dormientibus æquitas subvenit.*

By whom the Borrower's Statutory Claim to Relief may be put forward.—It is conceived that in all cases the right of the borrower to be relieved under sub-sects. (1) and (2) of sect. 1 of the Act, are not merely personal to himself, but may be put forward by his executors or administrators in case of his death, by his committee in lunacy in case of his lunacy, or by his trustee in bankruptcy. The question of the right of persons other than the borrower to take advantage of the Act, where it is sought to attack a transaction on the ground of illegality (*e.g.*, non-registration of money-lender and so forth), is considered in the notes to sect. 2.

(3) On any application relating to the admission or amount of a proof by a money-lender in any bankruptcy proceedings, the court may exercise the like powers as may be exercised under this section when proceedings are taken for the recovery of money.

In *In re a Debtor* (*e*) the Court of Appeal held that the power to give relief can be exercised by the Court of Bankruptcy upon the hearing of a petition by a money-lender for a receiving order against a borrower, the petition being founded on a final judgment recovered in an action in which the debtor did not apply for relief under sect. 1.

(*e*) [1903] 1 K. B. 705.

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This is not by reason of the language of the sub-section, which, it will be observed, only applies in terms to applications relating to the admission or amount of a proof by a money-lender, but is by reason of the well-established rule in bankruptcy under which the Bankruptcy Court is entitled to "go behind" a judgment and inquire into the consideration upon which it is founded. But for this rule a debtor, by submitting to judgment, might deprive his just creditors of their rights (*f*). The jurisdiction of the Registrar in Bankruptcy is not to set aside or review the judgment, but merely to decide whether he will or will not make a receiving order upon it (*g*). Accordingly his decision does not operate as *res judicata*.

By sect. 23 of the Bankruptcy Act, 1890:—

> "Where a debt has been proved upon a debtors' estate under the principal Act, and such debt includes interest, or any pecuniary consideration in lieu of interest, such interest or consideration shall, for the purposes of dividend, be calculated at a rate not exceeding 5 per cent. per annum, without prejudice to the right of a creditor to receive out of the estate any higher rate of interest to which he may be entitled after all the debts proved in the estate have been paid in full."

The above sub-section, which would accordingly appear not to have been required in order to cut down a money-lender's proof for the purposes of dividend, would seem to render money-lenders' proofs liable to be cut down for all purposes. It does not follow, however, that if cut down under this sub-section, they should be cut down to a 5 per cent. basis.

In *In re Attree, ex parte Ward* (*h*), a bankrupt was indebted to a money-lender for money lent, the money-

(*f*) See *Ex parte Kibble, In re Onslow*, L. R. 10 Ch. 373.
(*g*) *In re Vitoria*, [1894] 2 Q. B. 387.
(*h*) [1907] 2 K. B. 868.

lender holding a security for the debt. The creditor lodged a proof in the bankruptcy for the debt, stating the amount at which he valued the security. The proof was not made use of in voting at any meeting of creditors. The trustee having required the creditor to give up the security under Sched. I., rule 12 of the Bankruptcy Act, 1883, he gave notice of withdrawal of the proof, and of intention to correct the valuation by a new proof. The trustee then moved the Bankruptcy Court for an order for an account, and for relief under the Money-lenders Act. It was held that the jurisdiction of the Bankruptcy Court to exercise the powers of the Money-lenders Act arises only under the above sub-section, and is confined to cases in which there is an application before the Court relating to the admission or amount of a proof by a money-lender; that, as the proof had not been used either for purposes of voting or of claiming a dividend, the creditor was at liberty to withdraw it without the consent either of the trustee or of the Court; and that, as there was consequently no proof by the money-lender before the Court, it had no jurisdiction to entertain the motion.

This decision in no way impairs the decision in *In re a Debtor* (*i*). All it decides is that in such a case as *In re Attree*, the Bankruptcy Court has no jurisdiction at the instance of the trustee to exercise the jurisdiction of the Money-lenders Act upon motion [*Quære*, unless all parties to the proceedings assent thereto, or the money, or money's worth, or right in dispute does not, in the opinion of the Judge, exceed in value 200*l.*, B. A. 1883, sect. 102, sub-sect. (1)]. Whether or not the right to exercise the jurisdiction conferred by the Money-lenders Act could be exercised by the Bankruptcy Court, on motion, under sect. 102, sub-sect. (1), where all parties assented, or the amount in dispute was under the prescribed value, upon which question the writers express no opinion, it is

(*i*) *Supra.*

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conceived that *In re Attree* cannot be regarded as decisive of the point. However this may be, *In re Attree* does not in the least negative the writers' submission (*k*), that the right of the borrower to claim relief under the Act passes to his trustee in bankruptcy. It only negatives the right of the trustee to put forward such claim by way of motion in the Bankruptcy Court.

(4) The foregoing provisions of this section shall apply to any transaction which, whatever its form may be, is substantially one of money-lending by a money-lender (*l*)

(5) Nothing in the foregoing provisions of this section shall affect the rights of any bonâ fide assignee or holder for value without notice.

(6) Nothing in this section shall be construed as derogating from the existing powers or jurisdiction of any court.

(7) In the application of this Act to Scotland this section shall be read as if the words "or is otherwise such that a court of equity would give relief" were omitted therefrom (*m*).

Registration of money-lenders, &c.

2.—(1) A money-lender as defined by this Act—

(a) shall register himself as a money-lender in

(*k*) *Ante*, p. 101.

(*l*) Anyone who may be interested in the shifts and devices to which money-lenders had recourse to endeavour to evade the usury laws, when the statutes against usury were in operation, is referred to Part I. of "The Law of Money-lending, Past and Present," by the first-named of the present writers.

(*m*) For the reason why the words "or is otherwise such that a Court of Equity would give relief" were omitted from the application of the Act to Scotland, see Hansard, 4th Series, Vol. 87, p. 283. See also RIDLEY, J., in *Wilton* v. *Osborne*, [1901] 2 K. B. 110; also see Lord MACNAGHTEN in *Samuel* v. *Newbold*, [1906] A. C. 461, at p. 470. No distinction between law and equity obtains in Scotland.

accordance with regulations under this Act, at an office provided for the purpose by the Commissioners of Inland Revenue, under his own or usual trade name, and in no other name, and with the address, or all the addresses if more than one, at which he carries on his business of money-lender; and

(b) shall carry on the money-lending business in his registered name, and in no other name and under no other description, and at his registered address or addresses, and at no other address; and

(c) shall not enter into any agreement in the course of his business as a money-lender with respect to the advance and repayment of money, or take any security for money in the course of his business as a money-lender, otherwise than in his registered name; and

(d) shall on reasonable request, and on tender of a reasonable sum for expenses, furnish the borrower with a copy of any document relating to the loan or any security therefor.

(2) If a money-lender fails to register himself as required by this Act, or carries on business otherwise than in his registered name, or in more than one name, or elsewhere than at his registered address, or fails to comply with any other requirement of this section, he shall be liable on conviction under the Summary Jurisdiction Acts to a fine not exceeding one hundred pounds, and in the

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case of a second or subsequent conviction to imprisonment, with or without hard labour, for a term not exceeding three months, or to a fine not exceeding one hundred pounds, or to both: Provided that if the offender be a body corporate that body corporate shall be liable on a second or subsequent conviction to a fine not exceeding five hundred pounds.

(3) A prosecution under sub-section (1) (a) of this section shall not be instituted except with the consent in England of the Attorney-General or Solicitor-General, and in Ireland of the Attorney-General or Solicitor-General for Ireland.

EFFECT OF MONEY-LENDER NOT REGISTERING HIMSELF AS A MONEY-LENDER: EFFECT OF A REGISTERED MONEY-LENDER LENDING MONEY OTHERWISE THAN AT HIS REGISTERED ADDRESS, OR OTHERWISE THAN IN HIS REGISTERED NAME.

In *The Victorian Daylesford Syndicate* v. *Dott* (*n*) BUCKLEY, J. held that sect. 2, sub-sect. (1) (c) applies to the case of a money-lender who has not registered his name under the Act; and that the result is that he cannot make any valid agreement in the course of his business as a money-lender with respect to the advance or repayment of money, or take any security for money in the course of his business as a money-lender. In the case of *Bonnard* v. *Dott*, already referred to (*o*), KEKEWICH, J. had left this point open, and had granted Bonnard relief on the ground that his transactions with Dott were harsh and unconscionable. When *Bonnard* v.

(*n*) [1905] 2 Ch. 624; C. A., [1906] 1 Ch. 747.
(*o*) *Ante*, p. 38.

Dott reached the Court of Appeal (*p*) the point was taken that Dott was an unregistered money-lender, and the Court, approving BUCKLEY, J.'S, judgment in *Victorian Daylesford Syndicate* v. *Dott* (*q*), dismissed the appeal without going into the merits of the case. It was argued unsuccessfully on behalf of the defendant that the only section which applied to a money-lender who had neglected to register was sub-sect. (1) (a), and that the result of such neglect was that the money-lender rendered himself liable to criminal proceedings under sub-sect. (2). It was pointed out that whether a man was carrying on business as a money-lender or not was a difficult question of fact, and that a man might not know whether he was a money-lender or not. COLLINS, M.R., said that if a person chose not to register he must take the risk of any inconvenience to himself. It is now decided, therefore, beyond the possibility of question by any tribunal inferior to the House of Lords, that non-compliance by a money-lender with the requirements of sub-sect. (1) (a), (b) or (c) renders the contract illegal and unenforceable.

In *Staffordshire Financial Company* v. *Hunt* (*r*) the facts were as follows :—The plaintiffs were money-lenders duly registered, having their registered address at Walsall. The defendant applied to a money-lender registered under the name of Lester at Jermyn Street, London, for a loan, and promised to pay him a commission of 2½ per cent. on all loans procured by him and on all renewals. Lester obtained for the defendant an advance from the plaintiffs of 550*l.* on a promissory note which was payable in three months at Lester's office. Lester himself handed over the money at his office to the defendant. The note was renewed three times, and on each occasion the plaintiffs sent the note from Walsall to Lester, and Lester obtained the defendant's signature to it. From

(*p*) [1906] 1 Ch. 740.
(*q*) [1905] 2 Ch. 624.
(*r*) [1907] W. N. 258.

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the evidence it appeared that the office was Lester's and that the plaintiffs had no interest in it. Lester had done business with the plaintiffs for about nine years and had introduced one thousand customers to them. He was never paid anything by the plaintiffs, but used to take a commission from the customers. Promissory notes given by borrowers were made payable at Lester's office. The plaintiff's books were kept at their registered address at Walsall, and, although a director of the company frequently attended at Lester's office and there interviewed intending borrowers, all questions as to whether a loan or renewal should be made were decided at Walsall. The contention on behalf of the defendant was that the plaintiffs were carrying on business at Jermyn Street and, this being a breach of sub-sect. (1) (b), the whole transaction was illegal and the plaintiff was unable to recover anything upon the note. A. T. LAWRENCE, J. held that, having regard to the number of the transactions of loan conducted by the plaintiffs through Lester at Jermyn Street, they carried on business there, and that therefore the note sued upon was void. It is important to notice that in this case the transaction with the defendant was not a mere isolated occasion, but was a regular and systematic mode in which the plaintiffs were accustomed to carry on their business.

In *In re a Debtor, ex parte Carden* (*s*) the facts were as follows:—The debtor applied to one S. for a loan and was referred to one W. The debtor interviewed W. at a solicitor's office in Chancery Lane. W. tendered him a bill for 250*l.* payable at the office of Messrs. B. and Co., solicitors, London Wall. No drawer's name appeared upon the bill. The debtor accepted the bill but failed to meet it at maturity. On August 3, 1907, he was served with a writ at the suit of Mrs. Carden, who was a money-lender registered at an address in Kensington. W. now appeared as

(*s*) 52 Sol. Journal, 209.

the drawer of the bill and Mrs. Carden as indorsee. This was the first that the debtor had heard of Mrs. Carden. The debtor allowed judgment to go against him by default, and in due course a bankruptcy petition was presented against him. Before the Registrar evidence was given from which it appeared that Mrs. Carden's business was invariably transacted at the office of B. and Co. by a clerk in their employment who acted as her manager. The Registrar thought that the transaction was illegal under sub-sect. (1) (b) and accordingly dismissed the petition. The petitioner appealed, but the Court of Appeal affirmed the Registrar. COZENS-HARDY, M.R., without differing from the Registrar that the transaction was bad under (b), thought that it was clearly bad under (c) and rested his decision upon that ground. FLETCHER MOULTON, L.J., agreed that the transaction was illegal under (c), and expressed no opinion as to (b). BUCKLEY, L.J., thought the transaction illegal under both sub-sections. It is to be observed that here again it was not a question of an isolated transaction but of a transaction entered into "in the course of" the money-lender's business.

The question of isolated transactions arose in *King* v. *Turnbull* (*t*), *Blair* v. *Buckworth* (*u*), *King* v. *Massey* (*v*), and *Kirkwood* v. *Ostwind* (*x*). In *King* v. *Turnbull* one C. had called on the plaintiff and asked him to go to the City and discuss with the defendants a proposed loan to them. Plaintiff accordingly went and saw the defendants, and eventually the advance was made, and the promissory note signed in a restaurant in Bishopsgate Street. *The note was made payable at the plaintiff's registered address.* The plaintiff admitted in cross-examination that he had occasionally transacted loans away from his registered

(*t*) 24 T. L. R. 434.
(*u*) 24 T. L. R. 474.
(*v*) 24 T. L. R. 710.
(*x*) Unreported. See *post*, p. 111.

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address. LAWRANCE, J., distinguished the cases of *Staffordshire Financial Company* v. *Hunt* (*y*), and *In re a Debtor* (*z*), and held that there was no illegality in the transaction.

In *Blair* v. *Buckworth* (*a*) the transaction was not carried out at the plaintiff's registered address, but at a solicitor's office, and the defendant sought to avoid it upon this ground. Owing to the view which the Court took upon the merits it was not necessary to decide the point. GORELL BARNES, P., said that some of the observations of BUCKLEY, L.J. (*aa*), seemed to him to go rather further than at first sight one would think the Act justified. FARWELL, L.J., said:—

> "Whether it was a fact that a single transaction was sufficient or not to bring the case within the prohibition of sect. 2, sub-sect. (1) (b) of the Act would have to be considered hereafter, because they did not propose to give any final decision on the point. He would, however, point out that there was a difficulty in saying that the carrying out of a single transaction at a place which was not the money-lender's registered address was not a violation of the Act. The only thing attacked was that individual transaction, and that individual transaction, if not carried out at the registered address, seemed to infringe the provision which said that it must be done at no other than the registered address. The money-lending transaction apparently took place where the money was lent, and the documents signed, even if the negotiations might take place elsewhere. The words in sect. 2, sub-sect. (1) (b), 'at no other address,' would have to be considered by the Court which had finally to determine the point. It was also to be observed that sect. 2, sub-sect. (2) imposed a fine not exceeding 100*l.* upon a first conviction, and a fine or imprisonment upon a second or subsequent conviction, which rather

(*y*) [1907] W. N. 258.
(*z*) 52 Sol. Journal, 209.
(*a*) 24 T. L. R. 474.
(*aa*) In *In re a Debtor*, 52 Sol. Journal, 209.

pointed to individual transactions. However, he desired to give no opinion upon the point, and he only suggested these matters as worthy of consideration by the Court which would have to decide the point."

In *King* v. *Massey* (*b*) the plaintiff called upon the defendant at his place of business, but no arrangement was made, and the defendant called on the plaintiff at his registered address but did not see him. The defendant then wrote to the plaintiff at his registered address, and in reply to the letter the plaintiff called upon the defendant and then and there completed the transaction. It was contended by the defendant that the transaction was illegal under sect. 2, sub-sect. (1) (b). DARLING, J., overruled this contention. The learned Judge said:—

"It was said that because on receipt of the letter the plaintiff went to the defendant's address and completed the transaction there the transaction was void, but the statute did not mean that. It was passed to prevent a money-lender registering himself at one address and carrying on business under other names and other addresses so that persons resorting to him would not know with whom they were dealing. Here the business was in fact carried on at 11, Cork Street, and for the plaintiff to call on the defendant and complete the loan as he had done was no violation of the statute."

In *Kirkwood* v. *Ostwind* (*c*) the defendants were shopkeepers in London. The money-lender had a registered address at Ipswich, where his Ipswich branch business was conducted by a manager. An agent of the money-lender called upon defendants at their shop and procured them to sign an application to plaintiff for a loan which the agent then sent by post to the plaintiff at Ipswich. Plaintiff's manager then wrote to defendants from Ipswich, *the letter paper bearing the registered address printed at its*

(*b*) 24 T. L. R. 710.

(*c*) Unreported. 16th May, 1908. One of the writers was of counsel in this case for the money-lender, and can vouch for the accuracy of the text.

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head, making an appointment to call upon defendants. The manager called next day, pursuant to the appointment, upon defendants at their shop. The transaction was completed then and there. The money was paid over to the defendants, and the defendants signed a promissory note *which was made payable to the plaintiff at his registered address at Ipswich.* GRANTHAM, J., held that there had not been any such violation of the provisions of the Act as to invalidate the transaction, upon which plaintiff accordingly recovered.

At the present time, therefore, the authorities appear to stand as follows upon the question of the registered address in relation to isolated transactions. LAWRANCE, J., in *King* v. *Turnbull*, CHANNELL, J., in *Blair* v. *Buckworth*, DARLING, J., in *King* v. *Massey*, and GRANTHAM, J., in *Kirkwood* v. *Ostwind*, have all decided in cases where the point was directly raised and relied upon, that the business of a loan may be sufficiently transacted by a money-lender at his registered address although the actual handing over of the money and the signature by the borrower of the promissory note or other security may take place elsewhere. In *King* v. *Turnbull*, *Blair* v. *Buckworth*, and *Kirkwood* v. *Ostwind*, the promissory note was made payable to the money-lender at his registered address. So, it may be safely assumed, was the promissory note in *King* v. *Massey*, though the report is silent on the point (*d*).

Against these judgments, which a Judge of first instance would probably regard as binding upon him, must be set the weighty *dicta* of FARWELL, L.J., in *Blair* v. *Buckworth*. It may be observed that *King* v. *Turnbull* was decided before *Blair* v. *Buckworth*, and that *Blair* v. *Buckworth* was not cited to DARLING, J., in *King* v. *Massey*. Lord

(*d*) The plaintiff in *King* v. *Massey* was also plaintiff in *King* v. *Turnbull*. The practice of money-lenders to make the promissory note which they take payable at their registered address is almost invariable in the writers' experience.

Justice FARWELL'S observations were, however, cited to GRANTHAM, J., in *Kirkwood* v. *Ostwind*. The reversal of CHANNELL, J., in *Blair* v. *Buckworth*, being based upon a different ground, due authority of his judgment on this point remains unshaken, save in so far as it has been shaken by the observations of FARWELL, L.J., in the Court of Appeal.

Inasmuch as loans are frequently carried out entirely through the agency of the post, and still more frequently by means of the money-lender or his agent attending upon the borrower at his place of residence or business, it is evident that if effect should hereafter be given to the view foreshadowed by FARWELL, L.J., a serious interference will be caused with the accustomed mode of transacting business, and much inconvenience may be occasioned to borrowers, who will have to attend, either personally or by agent, at the registered address of the money-lender. On the other hand, the transaction of the business of the lending of money outside the registered address is scarcely taken out of the mischief of the Act by the promissory note being made payable at the registered address, as the borrower (as happened, indeed, in *Blair* v. *Buckworth*) may deny that he knew that he was dealing with a registered money-lender (for the address being placed upon the note is not calculated to convey this information), and the actual presence of the borrower, or his accredited agent, at the registered address of the money-lender, at the completion of the loan, obviously tends strongly to secure to the borrower the protection designed for him by the Legislature in this connection. The question will probably not be set at rest until the Court of Appeal has pronounced upon it.

The circumstance that the money-lender was not duly registered was held by SWINFEN EADY, J., in *Dott* v. *Brickwell* (*e*), not to disentitle him to recover back from a fraudulent borrower money which such borrower had

(*e*) 23 T. L. R. 61.

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obtained from him by fraudulent representations. In this case, it will be observed, the money-lender was not suing upon the contract.

"HE WHO SEEKS EQUITY MUST DO EQUITY."

In *Lodge* v. *National Union Investment Company, Ld.* (*f*), the plaintiff had borrowed money from the defendant, who held as security certain assignments, bills of exchange, and securities. The defendants were unregistered money-lenders, and on 23rd May, 1906, the plaintiff commenced an action in the Chancery Division in which he claimed a declaration that the whole of the contracts between him and the defendants were illegal and void against him, delivery up of the assignments, bills and securities, and repayment of 150*l.* paid for the renewal of the bills. The only question that arose was whether the plaintiff was entitled to the relief sought without repaying any of the money which had been advanced to him. PARKER, J., after reviewing the authorities, said it would be difficult to say what would be the result if the plaintiff were suing in detinue or trover. He continued :—

> "In my judgment, however, with the possible exception of the 150*l.*, the whole of this action is put forward as an equitable claim, and not as a legal claim. The statement of claim is not framed with reference to any right in trover or detinue ; it is framed with reference to the relief to which the plaintiff would be entitled in equity. Under these circumstances . . . I can decide this case on the ground that, with the exception of the 150*l.*, it is an equitable action, and apply the principle in *Mason* v. *Gardiner*" (*g*).

The learned Judge then pointed out that the action for money had and received was an equitable action (*h*), and concluded:—

(*f*) [1907] 1 Ch. 300.
(*g*) 4 Bro. C. C. 436.
(*h*) *Moses* v. *Macferlane*, 2 Burr. 1005, 1012.

"I do not think it is either *aequum* or *bonum* that the plaintiff, who has had the benefit of the 1,075*l.*, and who is relying upon the illegality of the contract, and the exception enabling him to sue notwithstanding such illegality, should have relief without being put on terms by which both parties may be restored to the positions they occupied before the transaction commenced" (*i*).

The case of *Lodge* v. *National Union Investment Company* (*k*) was distinguished by EVE, J., in *Chapman* v. *Michaelson* (*l*). In that case the plaintiff claimed a declaration that a money-lending transaction was illegal and void, but asked for no consequential relief. The learned Judge said:—

"I have been much pressed with the decision of PARKER, J., in *Lodge* v. *National Union Investment Company* (*k*), where it was held that a mortgagee will not be ordered to give up his securities except upon the terms that the mortgagor shall repay the money which has been advanced to him. But the basis of that decision is that the relief asked for could only be obtained in a Court of Equity or as equitable relief, and would not be given except on the terms of the plaintiff doing equity. In the present case the plaintiff is not seeking equitable relief. In the case before PARKER, J., the plaintiff was trying to get consequential equitable relief—that is, the delivery up of the securities. Here no such relief is asked for. All that the plaintiff asks for is a declaration, and I think I should be extending the principle laid down by PARKER, J., too far if I were to make it a condition of his obtaining a declaration that he must repay the money advanced" (*n*).

(*i*) The whole of the judgment of the learned Judge will well repay a careful perusal.

(*k*) [1907] 1 Ch. 300.

(*l*) 24 T. L. R. 795.

(*n*) This case, it is understood, is under appeal. As one of the writers was of counsel for one of the parties the writers abstain from making any comments upon this decision pending the appeal.

SECT. 2. **MUST A MONEY-LENDER BE SOLELY INTERESTED IN THE MONEY WHICH HE LENDS?**

It is clear that the law can look behind the person who is the ostensible lender. If this were not so, an unregistered person might employ many agents in different towns, each of whom might be duly registered as a money-lender, having his registered address, and ostensibly carrying on the business of money-lending on his own behalf, and thus the unregistered person might in reality carry on the whole business, the registered money-lenders, his agents, being his mere puppets. It is plain that such an unregistered person could be hit criminally for carrying on business as a money-lender without being registered, and it is also clear that each of his registered agents might be convicted criminally of aiding and abetting such unregistered person, or of conspiring with him. Observe that this result can only be reached by admitting evidence going behind the ostensible lender, and showing who was the real principal whose money was being handled, and on whose behalf the ostensible lender was really carrying on the business. In an action by the registered ostensible money-lender it would, it is submitted, be open to the borrower to set up by way of defence that the plaintiff was merely an agent for an unregistered person, who was the real principal, whose money it was which was advanced, and that the contract therefore was illegal and void. If this submission is well founded it would appear to lead to important consequences. Thus, to go a step further:—If A. and B. are in partnership together in the business of money-lending, and A. alone is registered and carries on the business in his registered name, ostensibly on his own behalf, the money lent will be the money of A. and B. jointly. It is submitted that this case involves an infringement of the Act, and that all contracts entered into by A. in his registered name, ostensibly on his own behalf, but in

reality on behalf of himself and B., are illegal and void. For B. is as truly a money-lender as A. is. He is equally interested with A. He is merely a sleeping partner. It is submitted that in such a case B. is liable to be convicted as a principal offender, and that A. is liable to be convicted of aiding and abetting B., or of conspiracy with B. Also that borrowers may set up the illegality by way of defence. If this were not so an unregistered man might be interested in any number of businesses as a partner with any number of registered ostensible money-lenders. He might furnish the master mind, and control each of the businesses from behind the scenes, and the Act might be very effectively evaded. The device of registering several "one man companies," each duly registered as the money-lender, and of controlling such companies from behind the scenes, the several businesses thus carried on being ostensibly the separate businesses of the several companies, but in truth and in fact the businesses of the unregistered operator, has already been tried and has come to grief (*o*).

It would seem to be impossible for several registered money-lenders, not carrying on business in partnership, to join together in making an advance of money in their joint names. For, as a registered money-lender must transact the business at his registered address, how can several money-lenders, each having a separate registered address, transact the business of the advance at "his" registered address? If it is transacted at the registered address of one of them, then it will not be transacted at the registered addresses of the others. It might be argued that a joint loan by several registered money-lenders would not be within the Act at all, inasmuch as such a loan would not be "in the course of his business as a money-lender," but would be a transaction outside his business, and

(*o*) A person was convicted of carrying on business at unregistered addresses in July, 1905. See *The Times*, 5th and 18th July, 1905. A solicitor who aided and abetted him was suspended for three years. *The Times*, 9th May, 1906.

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therefore not within sect. 2, sub-sect. (1) (c), and that such a transaction would not infringe sub-sect. (1) (b) because it would not be a carrying on by the money-lender of the business of money-lending at all, but in relation to the business would be a foreign isolated transaction. Although, doubtless, there would be much force in this contention, it is submitted that to countenance it would be to open so wide a door to the evasion of the Act that it is unlikely that the Court would allow such an argument to prevail.

Other possible cases may suggest themselves to the mind of the reader. The writers do not propose to attempt to forecast every case which may arise. They propose to content themselves with making the following submission :—

That a registered money-lender will be well advised to lend his own money, and not money which either belongs to other people, or in which other people are interested jointly with himself, whether so interested in equal shares or not, and that an unregistered person so long as he continues unregistered will be well advised not to attempt to carry on business as a money-lender, or be in any way concerned or interested in any money-lending business.

It is, of course, not intended to suggest that there is any illegality in lending money to a registered money-lender on terms in no way suggestive of a partnership between creditor and debtor ; or in holding shares in, or debentures of, a *bonâ fide* limited company which *bonâ fide* carries on the business of money-lending, and either is duly registered or is exempt from registration, as the case may be.

BY WHOM THE QUESTION OF ILLEGALITY MAY BE SET UP.

It is submitted that the following persons are entitled to set up the question of illegality by reason of non-compliance

with the provisions of the Act; (a) The borrower himself; (b) his legal personal representatives (or his heir if interested) if he be dead; (c) his committee in lunacy, if he have been found lunatic, or (d) his trustee in bankruptcy if he be adjudged bankrupt.

In *Chapman* v. *Michaelson* (*p*) one Loyd had created certain charges upon a reversionary interest to which he was entitled to various money-lenders, and amongst others to the defendant. Loyd was adjudged bankrupt. He then carried in a scheme of arrangement in the bankruptcy which was approved by his creditors and by the Court, and the bankruptcy was accordingly annulled. By the scheme the bankrupt's assets were vested in Mr. Chapman, the official receiver, upon trust to administer such assets as provided by the scheme. The scheme provided for the payment in full of certain scheduled secured creditors, and afterwards for payment to the unsecured creditors of 20*s.* in the £. The defendant was included as a secured creditor in the schedule for the full amount of the charge held by him. The assets were more than sufficient to pay all the creditors, unsecured as well as secured, in full. After the scheme had been approved and the bankruptcy annulled, it was discovered that defendant had made the advance to Loyd under circumstances which, it was admitted, would have rendered the transaction illegal under the Act, if Loyd, not having been bankrupt, or, he being bankrupt, if his trustee in bankruptcy had taken steps to impeach the transaction. Loyd had since been adjudicated bankrupt in a second bankruptcy, but his trustee in such second bankruptcy was not a party to the action. Mr. Chapman, the trustee under the scheme, commenced an action to have it declared that, in administering the assets under the scheme, he might ignore defendant's charge upon the ground that it was void for the illegality. Amongst other defences raised it was contended that Mr. Chapman had no right to impugn

(*p*) 24 T. L. R. 795.

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the validity of defendant's charge; and that the only persons who could be heard to set up the illegality were Loyd himself and his trustee in his second bankruptcy, neither of whom were parties to the action. This contention was passed over in the judgment; EVE, J., made the declaration asked for by the plaintiff, thus negativing the contention above stated. If this decision should be affirmed by the Court of Appeal it will, *semble*, establish the proposition that a trustee in whom property is vested upon trust to administer it for the benefit of certain named beneficiaries may, in case the claim of one of the beneficiaries is founded upon an illegality by reason of non-compliance with the Act, and accordingly void as between the creator of the trust and the beneficiary, obtain a declaration that he is entitled to exclude the beneficiary from participation in the benefits of the trust; thus adding such a trustee to the list of persons entitled to raise the question of illegality against the money-lender (*q*).

The question has also been raised upon an interpleader, issue where an execution creditor attacked a bill of sale upon the ground that the grantee was an unregistered money-lender and that the bill of sale was accordingly illegal and void. The interpleader issue referred to was *Furber* v. *Fieldings, Ld.* (*r*), tried before PHILLIMORE, J., on 23rd February, 1907. PHILLIMORE, J., found the bill of sale holder was not a money-lender, and it therefore became unnecessary to decide the point for which the case is here mentioned; but PHILLIMORE, J., said that if it had been necessary to decide the point he should have been prepared to hold that, the grantor not having taken any steps to avoid the bill of sale on the ground of illegality, it was not competent to the execution creditor to attack the bill of sale upon such a ground. That the bill of sale

(*q*) The case is noticed on another point on p. 115.

(*r*) Reported, but not on this point, 23 T. L. R. 362. The account given in the text is taken from the shorthand notes kindly lent to the writers by Messrs. Windybank, Samuell and Lawrence, the solicitors for the execution creditors.

being good and sufficient upon its face, it must be taken to be valid as against all the world, other than the grantor, who alone was entitled to claim the benefit of the Money-lenders Act. The *dicta* of PHILLIMORE, J., not amounting to a decision upon the question, the point must be regarded as an open one.

Regulations as to registration.

3.—(1) The Commissioners of Inland Revenue, subject to the approval of the Treasury, may make regulations respecting the registration of money-lenders, whether individuals, firms, societies, or companies, the form of the register, and the particulars to be entered therein, and the fees to be paid on registration and renewal of registration, not exceeding one pound for each registration or renewal, and respecting the inspection of the register and the fees payable therefor (*s*).

(2) The registration shall cease to have effect at the expiration of three years from the date of the registration, but may be renewed from time to time, and if renewed shall have effect for three years from the date of the renewal.

Penalties for false statements and representations.

4. If any money-lender, or any manager, agent, or clerk of a money-lender, or if any person being a director, manager, or other officer of any corporation carrying on the business of a money-lender, by any false, misleading, or deceptive statement, representation, or promise, or by any dishonest concealment of material facts, fraudulently induces or attempts to induce any person to borrow money or to agree to the terms on which money is or is to be borrowed, he shall be guilty of a misdemeanour, and shall be liable on indictment to

(*s*) For order as to fees, see Appendix D.

SECTS. 4—6. imprisonment, with or without hard labour, for a term not exceeding two years, or to a fine not exceeding five hundred pounds, or to both.

Amendment of 55 & 56 Vict. c. 4, s. 2, as to presumption of knowledge of infancy.

5. Where in any proceedings under section two of the Betting and Loans (Infants) Act, 1892, it is proved that the person to whom the document was sent was an infant, the person charged shall be deemed to have known that the person to whom the document was sent was an infant, unless he proves that he had reasonable ground for believing the infant to be of full age.

Definition of money-lender.

6. The expression "money-lender" in this Act shall include every person whose business is that of money-lending, or who advertises or announces himself or holds himself out in any way as carrying on that business; but shall not include—

(a) any pawnbroker in respect of business carried on by him in accordance with the provisions of the Acts for the time being in force in relation to pawnbrokers; or

(b) any registered society within the meaning of the Friendly Societies Act, 1896, or any society registered or having rules certified under sections two or four of that Act, or under the Benefit Building Societies Act, 1836, or the Loan Societies Act, 1840, or under the Building Societies Acts, 1874 to 1894; or

59 & 60 Vict. c. 25.

6 & 7 Will. IV. c. 32.

3 & 4 Vict. c. 110.

(c) any body corporate, incorporated or empowered by a special Act of Parliament to lend money in accordance with such special Act; or

(d) any person bonâ fide carrying on the business of banking or insurance or bonâ fide carrying on any business not having for its primary object the lending of money, in the course of which and for the purposes whereof he lends money; or

(e) any body corporate for the time being exempted from registration under this Act by order of the Board of Trade made and published pursuant to regulations of the Board of Trade.

Sub-sect. (d) was considered by KEKEWICH, J., in *Bonnard* v. *Dott* (*t*). In that case the defendant's unsuccessful contention was that he only lent money incidentally to his speculations in shares. The contrary was found to be the fact.

In *Litchfield* v. *Dreyfus* (*u*) the plaintiff was an art dealer, and in the course of his business he gave long credit and took bills from his customers. In 1903 he retired and sold his business, and took bills for the greater part of the purchase-money and renewed the bills from time to time. After his retirement he acted as an art valuer, and assisted two or three art businesses in which he was interested by discounting the bills of customers. There were about ten people, with whom he had been connected in business, that he assisted from time to time, either by loans or by discounting bills for them. It was contended by the defendant that the plaintiff was an unregistered money-lender. FARWELL, J., overruled this contention, and in the course of his judgment said :—

"Speaking generally, a man who carries on a money-lender's business is one who is ready and willing to lend to

(*t*) 92 L. T. 822.
(*u*) [1906] 1 K. B. 584.

SECT. 6.

all and sundry, provided they are from his point of view eligible. I do not of course mean that a money-lender can evade the Act by limiting his *clientèle* to those whom he chooses to designate as 'friends' or otherwise: it is a question of fact in each case. . . . The Act was intended only to apply to persons who are really carrying on the business of money-lending as a business, not to persons who lend money as an incident of another business or to a few old friends by way of friendship. This particular Act was supposed to be required to save the foolish from the extortion of a certain class of the community who are called money-lenders as an offensive term. Money-lending is a perfectly respectable form of business. Nobody says that bankers are rascals because they lend money. It is part of their everyday business. Bill-broking is well known in the City of London, and is a respectable business so long as it is carried on in a respectable manner. But the Legislature in casting its net has cast it very wide; and if a man is carrying on the business of a money-lender he is within the Act, although he may be free from all blame morally. The question in each case is, Does he carry on the business of a money-lender? That depends on the facts of the case."

Furber v. *Fieldings, Ld.* (*x*) was an interpleader issue. The plaintiff was a bill of sale holder and the defendants were execution creditors. The defendants alleged that the plaintiff was an unregistered money-lender, and that therefore his bill of sale was void. The plaintiff said that the business of his firm was that of auctioneers, estate agents, and valuers. They lent money on bills of sale because they thereby obtained a valuation fee. They never discounted bills or lent money on a personal security. In 1903 they advanced money on ten bills of sale, in 1904 on fifteen, in 1905 on seventeen, and in 1906 on twenty-two.

PHILLIMORE, J., held that the plaintiff had brought himself within the second part of the exception referred

(*x*) 23 T. L. R. 362.

to in sect. 6 (d) of the Act, as carrying on a business in the course and for the purposes of which he lent money, and that consequently he was under no obligation to register himself as a money-lender.

Sub-sect. (*e*). For Regulations dated 25th October, 1900, made by the Board of Trade as to the exemption of bodies corporate, see App. C.

Short title and commencement.

7.—(1) This Act may be cited as the Money-lenders Act, 1900.

(2) This Act shall come into operation on the first day of November one thousand nine hundred.

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APPENDIX A.

MONEY-LENDERS ACT, 1900.

(63 & 64 Vict. c. 51.)

An Act to amend the Law with respect to Persons carrying on business as Money-lenders. [8th August, 1900.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

Re-opening of transactions of money-lender.

1.—(1) Where proceedings are taken in any court by a money-lender for the recovery of any money lent after the commencement of this Act, or the enforcement of any agreement or security made or taken after the commencement of this Act, in respect of money lent either before or after the commencement of this Act, and there is evidence which satisfies

the court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges, are excessive, and that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a court of equity would give relief, the court may re-open the transaction, and take an account between the money-lender and the person sued, and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, re-open any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of such principal, interest and charges, as the court, having regard to the risk and all the circumstances, may adjudge to be reasonable; and if any such excess has been paid, or allowed in account, by the debtor, may order the creditor to repay it; and may set aside, either wholly or in part, or revise, or alter, any security given or agreement made in respect of money lent by the money-lender, and if the money-lender has parted with the security may order him to indemnify the borrower or other person sued.

(2) Any court in which proceedings might be taken for the recovery of money lent by a money-lender shall have and may at the instance of the borrower or surety or other person liable, exercise the like powers as may be exercised under this section, where proceedings are taken for the recovery of money lent, and the court shall have power, notwithstanding any provision or agreement to the contrary, to entertain any application under this Act by the borrower or surety, or other person liable, notwithstanding that the time for repayment of the loan, or any instalment thereof, may not have arrived.

(3) On any application relating to the admission or amount of proof by a money-lender in any bankruptcy proceedings, the court may exercise the like powers as may be exercised under this section when proceedings are taken for the recovery of money.

(4) The foregoing provisions of this section shall apply to any

transaction which, whatever its form may be, is substantially one of money-lending by a money-lender.

(5) Nothing in the foregoing provisions of this section shall affect the rights of any bonâ fide assignee or holder for value without notice.

(6) Nothing in this section shall be construed as derogating from the existing powers or jurisdiction of any court.

(7) In the application of this Act to Scotland this section shall be read as if the words "or is otherwise such that a court of equity would give relief" were omitted therefrom.

Registration of money-lenders, &c.

2.—(1) A money-lender as defined by this Act—

(a) shall register himself as a money-lender in accordance with regulations under this Act, at an office provided for the purpose by the Commissioners of Inland Revenue, under his own or usual trade name, and in no other name, and with the address, or all the addresses if more than one, at which he carries on his business of money-lender; and

(b) shall carry on the money-lending business in his registered name, and in no other name and under no other description, and at his registered address or addresses, and at no other address; and

(c) shall not enter into any agreement in the course of his business as a money-lender with respect to the advance and repayment of money, or take any security for money in the course of his business as a money-lender, otherwise than in his registered name; and

(d) shall on reasonable request, and on tender of a reasonable sum for expenses, furnish the borrower with a copy of any document relating to the loan or any security therefor.

(2) If a money-lender fails to register himself as required by this Act, or carries on business otherwise than in his registered name, or in more than one name, or elsewhere than at his registered address, or fails to comply with any other requirement of this section, he shall be liable on conviction under the Summary Jurisdiction Acts to a fine not exceeding one

hundred pounds, and in the case of a second or subsequent conviction to imprisonment, with or without hard labour, for a term not exceeding three months, or to a fine not exceeding one hundred pounds, or to both: Provided that if the offender be a body corporate that body corporate shall be liable on a second or subsequent conviction to a fine not exceeding five hundred pounds.

(3) A prosecution under sub-section (1) (a) of this section shall not be instituted except with the consent in England of the Attorney-General or Solicitor-General, and in Ireland of the Attorney-General or Solicitor-General for Ireland.

Regulations as to registration.

3.—(1) The Commissioners of Inland Revenue, subject to the approval of the Treasury, may make regulations respecting the registration of money-lenders, whether individuals, firms, societies, or companies, the form of the register, and the particulars to be entered therein, and the fees to be paid on registration and renewal of registration, not exceeding one pound for each registration or renewal, and respecting the inspection of the register and the fees payable therefor.

(2) The registration shall cease to have effect at the expiration of three years from the date of the registration, but may be renewed from time to time, and if renewed shall have effect for three years from the date of the renewal.

Penalties for false statements and representations.

4. If any money-lender, or any manager, agent, or clerk of a money-lender, or if any person being a director, manager, or other officer of any corporation carrying on the business of a money-lender, by any false, misleading, or deceptive statement, representation, or promise, or by any dishonest concealment of material facts, fraudulently induces or attempts to induce any person to borrow money or to agree to the terms on which money is or is to be borrowed, he shall be guilty of a misdemeanour, and shall be liable on indictment to imprisonment, with or without hard labour, for a term not exceeding two years, or to a fine not exceeding five hundred pounds, or to both.

Amendment of 55 & 56 Vict. c. 4, s. 2, as to pre-

5. Where in any proceedings under section two of the Betting and Loans (Infants) Act, 1892, it is proved that the person to whom the document was sent was an infant, the

person charged shall be deemed to have known that the person to whom the document was sent was an infant, unless he proves that he had reasonable ground for believing the infant to be of full age. Presumption of knowledge of infancy.

6. The expression "money-lender" in this Act shall include every person whose business is that of money-lending, or who advertises or announces himself or holds himself out in any way as carrying on that business; but shall not include— Definition of money-lender.

(a) any pawnbroker in respect of business carried on by him in accordance with the provisions of the Acts for the time being in force in relation to pawnbrokers; or

(b) any registered society within the meaning of the Friendly Societies Act, 1896, or any society registered or having rules certified under sections two or four of that Act, or under the Benefit Building Societies Act, 1836, or the Loan Societies Act, 1840, or under the Building Societies Acts, 1874 to 1894; or 59 & 60 Vict. c. 25. 6 & 7 Will. IV. c. 32. 3 & 4 Vict. c. 110.

(c) any body corporate, incorporated or empowered by a special Act of Parliament to lend money in accordance with such special Act; or

(d) any person bonâ fide carrying on the business of banking or insurance or bonâ fide carrying on any business not having for its primary object the lending of money, in the course of which and for the purposes whereof he lends money; or

(e) any body corporate for the time being exempted from registration under this Act by order of the Board of Trade made and published pursuant to regulations of the Board of Trade.

7.—(1) This Act may be cited as the Money-lenders Act, 1900. Short title and commencement.

(2) This Act shall come into operation on the first day of November one thousand nine hundred.

APPENDIX B.

THE INFANTS' RELIEF ACT, 1874.

(37 & 38 Vict. c. 62.)

1. All contracts whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void: Provided always, that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable.

2. No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age.

3. This Act may be cited as "The Infants' Relief Act, 1874."

See Appendix I.

BETTING AND LOANS (INFANTS) ACT, 1892.

(55 Vict. c. 4.)

An Act to render Penal the inciting Infants to Betting or Wagering or to borrowing Money. [29th March, 1892.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and

Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

Persons sending documents to an infant inciting to betting guilty of a misdemeanour.

1.—(1) If anyone, for the purpose of earning commission, reward, or other profit, sends or causes to be sent to a person whom he knows to be an infant any circular, notice, advertisement, letter, telegram, or other document which invites or may reasonably be implied to invite the person receiving it to make any bet or wager, or to enter into or take any share or interest in any betting or wagering transaction, or to apply to any person or at any place, with a view to obtaining information or advice for the purpose of any bet or wager, or for information as to any race, fight, game, sport, or other contingency upon which betting or wagering is generally carried on, he shall be guilty of a misdemeanour, and shall be liable, if convicted on indictment, to imprisonment, with or without hard labour, for a term not exceeding three months, or to a fine not exceeding one hundred pounds, or to both imprisonment and fine, and if convicted on summary conviction, to imprisonment, with or without hard labour, for a term not exceeding one month, or to a fine not exceeding twenty pounds, or to both imprisonment and fine.

(2) If any such circular, notice, advertisement, letter, telegram, or other document as in this section mentioned names or refers to anyone as a person to whom any payment may be made, or from whom information may be obtained, for the purpose of or in relation to betting or wagering, the person so named or referred to shall be deemed to have sent or caused to be sent such document as aforesaid, unless he proves that he had not consented to be so named, and that he was not in any way a party to, and was wholly ignorant of, the sending of such document.

Persons sending to infants circulars inviting to borrow money guilty of a misdemeanour.

2.—(1) If anyone, for the purpose of earning interest, commission, reward, or other profit, sends or causes to be sent to a person whom he knows to be an infant any circular, notice, advertisement, letter, telegram, or other document which invites or may reasonably be implied to invite the person receiving it to borrow money, or to enter into any transaction involving the borrowing of money, or to apply to any person

or at any place with a view to obtaining information or advice as to borrowing money, he shall be guilty of a misdemeanour and shall be liable, if convicted on indictment, to imprisonment, with or without hard labour, for a term not exceeding three months, or to a fine not exceeding one hundred pounds, or to both imprisonment and fine, and if convicted on summary conviction, to imprisonment, with or without hard labour, for a term not exceeding one month, or to a fine not exceeding twenty pounds, or to both imprisonment and fine.

(2) If any such document as above in this section mentioned sent to an infant purports to issue from any address named therein, or indicates any address as the place at which application is to be made with reference to the subject-matter of the document, and at that place there is carried on any business connected with loans, whether making or procuring loans or otherwise, every person who attends at such place for the purpose of taking part in or who takes part in or assists in the carrying on of such business shall be deemed to have sent or caused to be sent such document as aforesaid, unless he proves that he was not in any way a party to and was wholly ignorant of the sending of such document.

Knowledge of infancy presumed in certain cases.

3. If any such circular, notice, advertisement, letter, telegram, or other document as in the preceding sections or either of them mentioned is sent to any person at any university, college, school, or other place of education, and such person is an infant, the person sending or causing the same to be sent shall be deemed to have known that such person was an infant, unless he proves that he had reasonable ground for believing such person to be of full age.

Soliciting infant to make affidavit in connexion with loan.

4. If anyone, except under the authority of any court, solicits an infant to make an affidavit or statutory declaration for the purpose of or in connexion with any loan, he shall be liable, if convicted on summary conviction, to imprisonment, with or without hard labour, for a term not exceeding one month, or to a fine not exceeding twenty pounds, or to both imprisonment and fine, and if convicted on indictment, to imprisonment, with or without hard labour, for a term not

exceeding three months, or to a fine not exceeding one hundred pounds.

Avoiding contract for payment of loan advanced during infancy.

5. If any infant, who has contracted a loan which is void in law, agrees after he comes of age to pay any money which in whole or in part represents or is agreed to be paid in respect of any such loan, and is not a new advance, such agreement, and any instrument, negotiable or other, given in pursuance of or for carrying into effect such agreement, or otherwise in relation to the payment of money representing or in respect of such loan, shall, so far as it relates to money which represents or is payable in respect of such loan, and is not a new advance, be void absolutely as against all persons whomsoever.

For the purposes of this section any interest, commission, or other payment in respect of such loan shall be deemed to be a part of such loan.

Person charged a competent witness.

6. In any proceeding against any person for an offence under this Act such person and his wife or husband, as the case may be, may, if such person thinks fit, be called, sworn, examined, and cross-examined as an ordinary witness in the case.

Application to Scotland.

7. In the application of this Act to Scotland:

The word "infant" means and includes any minor or pupil:

The word "indictment" has the same meaning as in the Criminal Procedure (Scotland) Act, 1887:

50 & 51 Vict. c. 35.

The expression "summary conviction" means a conviction under the Summary Jurisdiction (Scotland) Acts.

Short title.

8. This Act may be cited as the Betting and Loans (Infants) Act, 1892.

APPENDIX C.

STATUTORY RULES AND ORDERS, 1900.—No. 804.

MONEY-LENDER.

REGULATIONS, DATED OCTOBER 25, 1900, MADE BY THE BOARD OF TRADE AS TO THE EXEMPTION OF BODIES CORPORATE FROM REGISTRATION UNDER THE MONEY-LENDERS ACT, 1900.

WHEREAS by section 6 of the above-mentioned Act it is provided that "the expression 'Money-lender' in this Act shall include every person whose business is that of money-lending, or who advertises or announces himself, or holds himself out in any way as carrying on that business; but shall not include, *inter alia*—

"(e) Any Body Corporate for the time being exempted from registration under this Act by order of the Board of Trade made and published pursuant to regulations of the Board of Trade":

Now, therefore, the Board of Trade, in pursuance of the powers vested in them by the above-recited section, do hereby make the following regulations accordingly:—

Regulations.

1. The application for exemption under the above section shall be made on foolscap paper in the Form A hereto annexed, and shall be signed by some responsible officer by and on behalf of the Body Corporate seeking for such exemption.

2. Such application shall be accompanied by—

(a) In a case of a Body Corporate registered under the Companies Acts, a copy of the Memorandum and

Articles of Association, and, in other cases, a copy of the Charter, Deed of Settlement, or other document of Incorporation, and the Regulations governing the rights of members, such copies being certified by some responsible Officer of the Body Corporate as true copies.

(b) A Statutory Declaration by a responsible Officer of the Body Corporate setting out the nature of the business carried on by the Body Corporate.

(c) A copy of the last balance sheet.

3. The Board of Trade may require, and the Body Corporate (if so required) shall supply, further information by Statutory Declarations, production of documents, or otherwise, as the Board may think proper, concerning the constitution, objects, and financial position of the Body Corporate, and also concerning the manner in which the said Body Corporate has carried on the business.

4. The Board of Trade may, if they think fit, require notice of the application to be advertised in such papers as they may prescribe.

5. If, in the opinion of the Board of Trade, the Body Corporate is a proper one for exemption under the Act, the Board will make an Order exempting such Body Corporate from registration under the Act upon such conditions and for such period as the Board may think fit. Such Order shall be in the annexed Form B, or in such other form as the Board shall from time to time direct.

6. In the case of a Body Corporate registered under the Companies Acts, the Order shall be signed in quadruplicate by the Permanent Secretary to the Board of Trade, or by one of the Assistant Secretaries to the Board, or by such person as may be authorised in that behalf by the President of the Board of Trade. In all other cases such Order shall be signed in triplicate in manner aforesaid. One copy will be retained by the Board, and another copy will be forwarded to the Body Corporate.

7. The Board of Trade will also forward another of such copies to the office provided by the Commissioners of Inland Revenue, as specified in Section 2 of the Act, and in the case

of a Body Corporate registered under the Companies Acts, will forward the remaining copy to the Registrar of Joint Stock Companies.

8. The Body Corporate shall forthwith publish a copy of the said Order in the *London* or *Edinburgh* or *Dublin Gazette*, as the case may require, and in such other papers as the Board of Trade may direct.

9. Upon the expiration of the period limited by any Order the Body Corporate may make a further application for renewal of the Order of exemption, and the Board of Trade may from time to time make further Orders exempting the Body Corporate from registration upon such conditions, and for such further period as the Board may think fit.

10. The Board of Trade may at any time by an Order signed in manner provided by Regulation numbered 6 hereof revoke any Order of exemption and shall cause notice of such revocation to be given to the Body Corporate, to the Commissioners of Inland Revenue, and in the case of Bodies Corporate registered under the Companies Acts, to the Registrar of Joint Stock Companies, and upon such revocation, the Body Corporate shall cease to be exempted from registration under the Money-lenders Act, 1900. The Board of Trade shall also cause a copy of the revoking Order to be published in the *London* or *Edinburgh* or *Dublin Gazette*, as the case may require.

COURTENAY BOYLE.

Board of Trade,
25th October, 1900.

A.

THE MONEY-LENDERS ACT, 1900.

Application for the Exemption of a Body Corporate from Registration under the above-mentioned Act.

I[1], of in the County of , being duly authorised in that behalf by[2] hereby make application to the Board of Trade on behalf of the said[3] , being a Body Corporate, incorporated by[4] for an order exempting the said Body Corporate from registration as a Money-lender

under the provisions of the above-mentioned Act, on the following grounds[5] :—

Dated this day of , 19 .

(Signed)

(*Here add official designation.*)

To the Secretary,
Board of Trade,
7, Whitehall Gardens,
London, S.W.

[1] Here insert name and address and official designation of applicant.
[2] Here insert name and address of Body Corporate.
[3] Here insert name of Body Corporate.
[4] Here state whether incorporated by Charter, Deed of Settlement or other document of incorporation, or under the Companies Acts.
[5] Here state grounds for exemption.

B.

THE MONEY-LENDERS ACT, 1900.

Order of Exemption.

In pursuance of the powers conferred upon the Board of Trade by section 6 (e) of the Money-lenders Act, 1900, the Board of Trade do hereby order that the[1] , whose address is[1] be exempted from registration as a Money-lender under the provisions of the above-mentioned Act for a period of three years from the date of the publication of this Order in the *Gazette*, or until earlier revocation of this Order by the Board of Trade.

Dated this day of , 19 .

Signed on behalf of the Board of Trade.

[1] Here insert full name and address of Body Corporate.

APPENDIX D.

STATUTORY RULES AND ORDERS, 1900.—No. 738.

PUBLIC OFFICE. COLLECTION OF FEES BY STAMPS.

ORDER OF THE COMMISSIONERS OF INLAND REVENUE DATED SEPTEMBER 11, 1900, AS TO THE AMOUNT OF FEES TO BE PAID UNDER THE MONEY-LENDERS ACT, 1900, AND TREASURY ORDER DATED OCTOBER 3, 1900, AS TO THE COLLECTION OF THE SAME BY MEANS OF STAMPS.

WHEREAS by Section 3 (1) of the Money-lenders Act, 1900 (63 & 64 Vict. cap. 51), it is provided, among other matters, that the Commissioners of Inland Revenue, subject to the approval of the Treasury, may make regulations respecting the fees to be paid on registration and renewal of registration, not exceeding one pound for each registration or renewal, and respecting the inspection of the register and the fees payable therefor:—

Now we, the undersigned, being two of the said Commissioners, with the approval of the Treasury, do hereby order and direct,—

1. That the fee to be paid in respect of each registration or renewal thereof, whether such renewal shall arise in consequence of the expiration of the statutory period of three years after which registration shall cease to have effect, or in consequence of any change which may be made during that period in respect of name or names, address or addresses, of the person or persons registered or in any other particular, shall be the sum of One pound.
2. That the fee payable for the inspection of each separate return on the register shall be the sum of One shilling. On the payment of this fee of One shilling, together with the Stamp duty of One shilling chargeable by law

on a certified copy or extract from any public register, any person shall, on demand, be furnished with a certified copy of any registered return.

F. L. ROBINSON,
EDMUND H. WODEHOUSE,
Two of the Commissioners of Inland Revenue.

Dated the eleventh day of September, 1900.

And whereas by Section 3 of the Public Offices Fees Act, 1879, it is provided that the Treasury may, from time to time, make, and when made, revoke, alter, or add to, regulations for all or any of the following purposes respecting fees in any public office; that is to say:—

1. Regulating the manner in which the fees taken in money are to be taken, accounted for, and paid over.
2. Determining the use of impressed or adhesive stamps and the mode of cancellation of adhesive stamps.
3. Regulating the use of stamps and prescribing the application thereof to documents from time to time in use, and requiring documents to be used for the purpose of such stamps.

Now we, the undersigned, being two of the Lords Commissioners of Her Majesty's Treasury, do hereby give notice and order and direct that the fees under the Money-lenders Act, 1900, mentioned in the foregoing Order shall be collected by means of stamps, and that all such stamps shall be impressed stamps.

The said impressed stamps shall be of such design and character as the Commissioners of Inland Revenue may from time to time adopt for the purpose.

We do further give notice that this Order shall be binding on all officers or persons whom it may in any way affect.

H. T. ANSTRUTHER,
W. H. FISHER,
Two of the Lords Commissioners of Her Majesty's Treasury.

Dated this 3rd day of October, 1900.

APPENDIX E.

COUNTY COURT RULES (FEBRUARY), 1901.

DATED 25 FEBRUARY, 1901.

ORDER 51, rule 246 (rule 44 of November, 1900), is hereby annulled, and the following rule shall stand in lieu thereof:—

1. Where proceedings are taken by a money-lender the powers of the Court under sub-sect. 1 of sect. 1 of the Money-lenders Act, 1900, may be exercised at any stage of the proceedings, and whether notice has or has not been given by the defendant of his intention to apply to the Court to exercise such powers; subject, nevertheless, where no notice or insufficient notice of such intention has been given, to such terms as to adjournment, furnishing of particulars, costs, and otherwise as may be just.

2. An application to the Court under sub-sect. 2 of sect. 1 of the said Act, at the instance of the borrower or surety or other persons liable, shall be by action commenced by plaint and summons in the ordinary way.

Particulars of demand shall be filed in such action stating concisely the grounds on which the application is made and the relief which the plaintiff claims.

ALFRED MARTINEAU.
HENRY R. STONOR.
W. L. SELFE.

Approved—

HALSBURY, C.
A. L. SMITH, M.R.
F. H. JEUNE, P.
ROLAND L. VAUGHAN WILLIAMS.
GAINSFORD BRUCE, J.
HERBERT H. COZENS-HARDY, J.
WALTER C. RENSHAW.

I allow this rule, which shall come into force on the 1st day of April, 1901.

(*Signed*) HALSBURY, C.

February 25, 1901.

APPENDIX F.

In the Court of Appeal,

Monday, May 4th, 1903.

Before LORD JUSTICE STIRLING and LORD JUSTICE MATHEW.

SAMUEL *v.* BURTON.

[*Transcript from the shorthand notes of Mr. William Rogers, 93 and 94, Chancery Lane, London, W.C.*]

JUDGMENT.

LORD JUSTICE STIRLING: This is an appeal from a decision of Mr. Justice BIGHAM, directing that judgment should be entered for the sum of 109*l.* The circumstances are these: The action is brought by a money-lender for the amount which he alleged to be due, namely 109*l.* Upon that an application was made to the Master that an inquiry should be made in accordance with the provisions of the Money-lenders Act. That Act requires that before such relief is given under it the Court should be satisfied that the interest in respect of the sums lent is excessive and in addition that the transaction is either harsh and unconscionable, or is otherwise such that a Court of Equity would give relief. It appears to have been held, in the first instance, when cases arose under this Act, that upon the true construction of the Act relief could not be given unless the interest was both excessive and the transaction was in respect of its being harsh and unconscionable, such that a Court of Equity would give relief. That was a decision in the Court of first instance. Afterwards the matter came before the Court of Appeal in the case of *In re a Debtor* (*a*), and there it has been laid down

(*a*) [1903] 1 K. B. 705.

that, under the Act in question, a transaction with a money-lender can be reopened when the Court is satisfied that the transaction is "harsh and unconscionable," even though it is not "such that a Court of Equity would have given relief before the Act," and in giving judgment the learned Judges, by the MASTER OF THE ROLLS, say this: "I will not say that, under this section, the interest charged and the other charges made might not be so excessive as to render the bargain harsh and unconscionable even as against a borrower who was of full age, and who stood in no special relation to the lender." Now what took place in the case which we have here is this. The Master made an order for an inquiry under the Money-lenders Act. That was appealed to the learned Judge, and thereupon, as I understand the order that has been read by Mr. Lawson Walton, the learned Judge said that he would take the inquiry himself, and that was done in this way. The parties appeared before him in chambers; the plaintiff, who was the money-lender, was examined, and cross-examined before him; but the borrower, although he appeared by counsel, was not examined or cross-examined, his counsel deliberately abstaining from calling him as a witness. Now, in these circumstances, it is said on behalf of the borrower, who is a man over thirty years of age, admittedly a man who is a man of business engaged under his father in an advertising business, and as to whose capacity no allegation or suggestion is made: "I had no separate advice" (reading defendant's affidavit to the words "exorbitant rate of interest I was paying." Now let us see what the transactions were. I do not propose to go through them all, but it begins with this transaction, that on the 1st of October, 1901, he borrows 40*l.*, undertaking to repay 50*l.* by five monthly payments of 10*l.* He actually repaid 40*l.* by four instalments, leaving 10*l.* still due. He then proposed, some time in 1902, to borrow 30*l.* more, thus having borrowed 40*l.*, or having 40*l.* owing from him. That he agreed to repay by five monthly instalments of 10*l.* In June, 1902, he had repaid 40*l.*, leaving 10*l.* due, and he then borrowed 30*l.* and entered into a similar agreement to pay 50*l.*, by five payments of 10*l.* each monthly. Then in July he procured the lender

to cash a post-dated cheque for 25*l.* post-dated for two months for 23*l.* 10*s.* In September there was owing to the money-lender 30*l.* in respect of the first transaction, and 25*l.* in respect of the second, making 55*l.*, and then he borrowed 45*l.*, making 100*l.*, and in respect of that he promised to repay 144*l.* by twelve monthly payments of 12*l.* each. He paid the instalments due up to February of 1903, leaving 84*l.* due. In December he again procured the money-lender to discount a cheque for 25*l.* post-dated for two months, and in respect of that he got 20*l.* Then when March has come, not having repaid the amount due on the cheque, and not having paid the instalment which became due in March, the money-lender issues his writ. What the amount of interest is that is actually charged for these transactions does not actually appear, and I am not prepared to say what it is. It may be 80 per cent. or not, I do not know, but it is to be observed that the transactions are perfectly plain on the face of them. The borrower knew perfectly well what he got, and what he was going to pay. It was put to him in the clearest form, and although he may not have appreciated the rate per cent., still he was a man of business, and he might very well have ascertained, but he did not choose to ascertain. That is all he says. I am not prepared to say that the interest is charged at such an excessive rate that the transaction ought on that ground to be held to be harsh and unconscionable within the meaning of the Act, and, that being so, no advantage having been taken of him, he being a man of full age and a man of business, I do not see, any more than Mr. Justice BIGHAM seems to have done, any ground for giving him relief under the Act, and I think the appeal ought to be dismissed.

LORD JUSTICE MATHEW: I am of the same opinion. The learned Judge undertook the inquiry under the Act, and his attention was directed necessarily according to the terms of the Act to the two questions, whether the interest charged was excessive, and whether the transaction was harsh and unconscionable. No case has been made out for that. I pass by the suggestion of something that the learned Judge is said to have remarked as to previons decisions. I am

sure he has been misunderstood with regard to that. Those are the two questions that he had to deal with. Now I agree with what the Court of Appeal has said, and I am sure that Mr. Justice BIGHAM would agree also that excessive interest may create a presumption of harsh and unconscionable conduct. It depends upon the circumstances of each particular case. If a money-lender is dealing with a clerk in needy circumstances, and knows perfectly well that if the clerk's employer knew that he was borrowing money in that way he would probably be dismissed, the inference of harsh and unconscionable conduct from an unreasonable rate of interest might very properly be implied, but in this case can we say that any such rule ought to be implied? It was suggested, in the first place, that there were a number of small transactions here, small borrowings, small amounts of money which would seem to indicate a condition of things which might be a temptation to a money-lender, and therefore we asked for information as to what the real transactions were. Now, it really comes to this in the end, that the plaintiff got from his debtor, who owed him 55*l.* in respect of former transactions and who borrowed 45*l.* more, the money-lender got an undertaking to pay 100*l.* with interest by twelve instalments running over the year, in other words, to pay 144*l.* in respect of what may be treated as an advance of 100*l.* Now, is that harsh and unconscionable? The defendant was not in a position to offer any evidence whatever on the subject. It was suggested in an affidavit that he did not quite understand how the interest was made up. Whose fault was that? There was no mystification about the different transactions; he is an adult engaged in business, and he did not have the boldness to satisfy the Judge that he did not know or could not have found out if he did not choose to shut his eyes as to what the exact nature of each transaction was. That being so, every opportunity was given to the defendant of showing that he had been treated harshly and unconscionably, but he withdrew practically from making any such imputation upon the plaintiff; and his counsel here to-day said, no matter what inquiry he might have made on the subject, he could not have added any-

thing to the evidence for the learned Judge in support of his contention that the terms were harsh and unconscionable. Under these circumstances, the learned Judge's conclusion in point of fact was perfectly right, and must be upheld. This appeal must be dismissed.

APPENDIX G.

In the Court of Appeal,

Wednesday, 11*th March*, 1908.

Before THE LORD CHIEF JUSTICE OF ENGLAND, LORD JUSTICE FARWELL, and LORD JUSTICE KENNEDY.

FIELDINGS *v.* PAWSON & OTHERS.

[*Transcript of the Shorthand Notes of William Rogers, 8, New Court, Carey Street, W.C.*]

F. Low, K.C., and *H. C. Dickens*, for the defendant (appellant).

H. E. Duke, K.C., and *J. B. Matthews*, for the plaintiffs (respondents).

JUDGMENT.

THE LORD CHIEF JUSTICE: In this case I regret to say the Court are not agreed as to the view we ought to take. The facts are that upon 16th March, 1907, the defendant, who is appealing, signed a promissory note whereby he undertook to pay 3,650*l.* by two instalments of 1,825*l.* each, on 16th June and 16th September, that is at three months and six months, and in the event of the first 1,825*l.* not being paid, the whole 3,650*l.* became payable at once. It is not disputed, in fact it is stated by Mr. Duke on behalf of the money-lender, that the rate of interest, if the instalments were punctually paid, would be 139 per cent., and if the default clause comes into operation, it would be 218 per cent. My brother Lord COLERIDGE has thought that there were no circumstances which justified him in re-opening the bargain, or in forcing the money-lender to receive less than he had agreed to take. I am unable to concur in that view. I think that, having regard to the facts that I will state, it was

incumbent upon the money-lender to give some explanation of why in such a bargain it was proper for him to charge at the rates I have mentioned, of 139 per cent., and still more, 218 per cent. in the event of failure to pay by instalments.

I have had to deal with these money-lenders' cases more than once, and I have never, so far as I know in the discharge of my judicial duties, pressed these matters unduly against money-lenders. I have always said, and I repeat it to-day, that I know money-lenders are a necessary class of people; I know that at times they have saved people from ruin and from misery, and they are a body of men who must exist; and therefore I have never, in dealing with these cases, as far as I know, dealt with the matter harshly or unfairly, certainly not intentionally so. On the other hand, it does seem to me that the Legislature has interfered to see that while money-lenders exist and while they carry on their business with certain risks but on remunerative terms to themselves, the Court shall under some circumstances have the power of ripping up the bargain and saying whether or not it ought to be enforced. I am disposed myself to agree that there is no such thing as a standard rate of interest beyond which it must be said that the interest is excessive, and below which it may be said the interest is not excessive. I think that each particular case must depend upon its particular facts; but I should certainly be disposed to say that, in the absence of admitted facts or proof that there are circumstances which tend to a very high rate of interest, it does lie upon the money-lender to give some explanation of rates of interest which are at or about 100 per cent. I do not overlook the fact that the common practice of money-lenders was to charge 60 per cent.; and a name has been given to them in consequence of their charging 1*s.* in the pound per month, and weak and poor individuals thought they were paying 5 per cent. per annum, as I have often heard suggested, in cases were military men and others not acquainted with business have been dealing with these matters.

I do not overlook the fact, and I must say for myself that I think the Legislature had that fact, among others, in view when it passed this statute.

Now it is suggested as the basis of my brother COLERIDGE'S judgment that the rate of interest being excessive is not in itself sufficient to justify the Court interfering, apart from other circumstances. Without going the full length of saying that it must be, I am quite clearly of opinion, and I think the House of Lords has distinctly affirmed the proposition, that if there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive the Court has power to interfere independently of other circumstances. I think, as was pointed out in the judgment of the House of Lords, that the words, "or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges are excessive, and that in either case the transaction is harsh and unconscionable or is otherwise such that a Court of equity would give relief," give the sort of circumstances under which the Court may give relief. I think that view was expressed in terms in the judgment of Lord JAMES in the case of *Samuel* v. *Newbold*, at page 472 of Law Reports, 1906 Appeal Cases, in the passage beginning: "The basis of the jurisdiction of the Court when granting relief is." Further, it is, I think, in all the judgments pointed out that they dissented from a very learned judgment of my brother CHANNELL, who had certainly thought and ruled that excessive interest was not in itself sufficient; and the House of Lords adopted the view of the Court of Appeal in *In re a Debtor*, reported in Law Reports, 1903, 1 King's Bench; and if reference is made to the very convenient summary of the *dicta* as they existed in contrast to my brother CHANNELL'S judgment, I refer to pages 40 to 43 of Mr. Matthews' very valuable book on the Law of Money-lending, I think it is clear that several learned Judges have expressed the view contrary to Mr. Justice CHANNELL'S view that the interest, if excessive, was of itself sufficient to justify the Court interfering. Without quoting more of them, I only quote with reference to the particular matter that I am considering, what Lord Justice COZENS-HARDY, the present Master of the Rolls, said in *Wells* v. *Allott*: "Where the interest appears on the face of the transaction to be excessive, whether it is 100*l.* per cent. or less, the further inquiry has to be undertaken, namely, whether

the interest is so excessive as to make the transaction harsh and unconscionable." I also think that the judgment of the LORD CHANCELLOR at pages 465 and 467 of 1906 Appeal Cases, in the case of *Samuel* v. *Newbold*, and the judgment of Lord MACNAGHTEN at page 470, recognise the proposition that if the Court conceives that the interest charged is excessive an explanation is required to be given by the money-lender to show that the bargain is not harsh and unconscionable upon that ground as upon others.

Now what are the facts here? There had been no previous transactions between Mr. J. J. Pawson and these money-lenders. It is true that Mr. J. J. Pawson had, on the evidence, dealt with money-lenders before, and Mr. Matthews put it quite correctly. The defendant had twice renewed a bill, and I assume that he had had to pay a pretty high rate of interest for doing so; but so far as these particular money-lenders are concerned they sent down a gentleman to him to get him to sign a promissory note. What are the facts which they had before them prior to their making this bargain, which was not finally completed until two days afterwards, when the other two people signed the notes? As far as Mr. J. J. Pawson was concerned it was completed on the 18th. They had had a report from some inquiry office stating that Mr. J. J. Pawson held an official position in the E. works, and was thought to be a wealthy man, and that he was supposed to be heir to an estate in Northumberland. The report stated, "That the opinion is that he will prove reasonably safe for any ordinary liabilities he may undertake, but for any such figures as mentioned adequate and reliable security should be forthcoming." That is for a suggested advance of 4,000*l.* or 5,000*l.* In addition to that Mr. Hazzard had gone down, and in his evidence before the learned Judge he says himself that he was told by this man that he was in charge of an important department of A. & Co., and was receiving a salary of 500*l.* a year, and had 1,200*l.* a year from private sources; that he only owed 300*l.* to a money-lender in London, and his total liabilities were 500*l.*, including the 300*l.* to this money-lender. Under those circumstances it does seem to me that if I am right in saying the Court is entitled to ask for some explanation of this rate

of interest, not only have the money-lenders failed to give any explanation, but, so far as they have given any explanation, it negatives their right to make such an excessive charge, and particularly to make such an excessive charge as 218 per cent. upon default being made. The man is in a respectable position, in a position where undoubtedly he will make every effort to pay. I designedly exclude from my consideration what Mr. Low has pressed upon me, that he did find the 2,000*l.* on 6th August. I abstain from considering what happened afterwards, but it seems to me that there is no evidence at all of excessive risk. There is, of course, the evidence that it was a money-lending transaction, that the brother wanted money. If the learned Judge had found as a fact that there was excessive risk, and that, having regard to that excessive risk, the money-lenders were entitled to this rate of interest, although I should be entitled, as this case was heard by the learned Judge alone, to have dealt with the matter by way of reviewing his finding, yet I should have had more hesitation. But with great deference he has not approached the proposition from that point of view at all. He has thought, and he so said, that because Mr. J. J. Pawson was anxious to help his brother, was anxious to get 400*l.* himself, knew that a large amount of this money was going to be paid in interest, and that O'Shea was a solvent man—that therefore he was content to make whatever bargain the people put before him. In my judgment that is not sufficient under the statute. I agree with Mr. Low that the statute was passed to protect people who do this kind of thing if the rate of interest is excessive, but I must point out that if it be true, as the learned Judge seems to have thought—and I dare say it was—that Mr. J. J. Pawson thought that Mr. O'Shea was a responsible person, there would be less reason for his consenting to be charged a higher rate of interest. What he may have known about his brother is another matter, but as far as Mr. O'Shea is concerned it would be an additional security against having to pay ; or he would have somebody to help him to pay if he was called upon.

I must discard from my consideration what we are told as to inquiries made by the money-lenders as to the position of

Mr. W. H. Pawson and as to the position of Mr. O'Shea. I think if it was intended to be used in support of the claim of the money-lenders to this rate of interest it ought to have been so put forward by them as reasons for the rate of interest which is suggested.

There are two other matters to which I do not think the learned Judge has paid sufficient importance. There is the letter which was signed by Mr. J. J. Pawson on the 16th March, which says: "I fully understand the terms of the transaction made to-day, and I am wishful for you to hand the proceeds to my brother," etc. (reading the letter). Now it is said that the only reason for that form of letter is that the gentleman was in a hurry. A much shorter document would have told him what interest he was paying. They need only to have put down 2,360*l.* and the balance; the difference between that and the 3,650*l.*, or a sum of 1,290*l.* interest. I am quite clear that the learned Judge does not mean to find as a fact that Mr. Pawson was told what this rate of interest was. The reasons he has given for his judgment show that he had not made up his mind upon that, and I agree with Mr. Matthews, who put it very fairly, that the learned Judge has been able to give reasons for his judgment which rendered it unnecessary for him to find as a fact that the defendant had been told. I confess that when we know that this money-lender's agent went down to this place, it is said by Mr. Dickens having in his pocket—but certainly I do not think it is presumed he would not have the printed document with him —the document which was filled up the next day as between Mr. W. H. Pawson and Mr. Gerald O'Shea, stating the total amounts, stating the rate of interest at 1,290*l.*, stating the agreement to pay off by instalments, and in three places saying that they perfectly understood this transaction—it would not have taken the time to sign that document that it would to write out the other letter. I certainly should come to the conclusion that the money-lenders had failed to satisfy the Court that they had brought this, the amount of interest or the rate he was paying, in any way properly to the notice of the person whom they were seeking to be surety for the money to be advanced to Mr. W. H. Pawson. No doubt the fact that

he was going to receive 400*l.* from his brother is to be taken into consideration; but in my judgment it is a fact wholly insufficient to justify the learned Judge in coming to the conclusion that the amount was not excessive, so far as he was concerned, from the point of view of the rate of interest, because he was willing to sign that document.

The question is what ought I to do under these circumstances? I have had to deal with this class of case more than once, and I have more than once expressed my view that I know that money-lenders do run considerable risks, sometimes more, and sometimes less, though in the long run the risks they run are very very far short of the rate of interest that they charge, or, in other words, they make a good thing out of it indeed: that is my experience. I have tried these cases, and I have had to do with them before; but, be that as it may, money-lenders are entitled to a high rate of interest. It is said that we ought to deal with this matter as though they advanced a sum of 1,987*l.* only. That I do not think. I think we ought to take this transaction as it stood, and inasmuch as there was paid to Mr. Pawson, and by him returned to the plaintiffs, the sum of 373*l.* for a previous debt, and there was a sum of 1,987*l.* cash advanced, I think we ought to take the money at 2,360*l.* as advanced on the 16th March. I desire to point out that in that respect I am not acting at all harshly towards the money-lender. I can well conceive that a considerable portion of that 373*l.* did not represent actual cash; but I do not think we ought to be particular in these matters. I think we ought to make people responsible to a certain extent for what they have done, and I think that it is not unfair to this defendant to say that the money advanced must be taken at the sum of 2,360*l.* Now I may be—I daresay I shall be—thought by some people to be giving too much, but I have acted throughout upon this principle. I think there is no evidence here to justify the suggestion that the money-lenders were running no risk at all. There is, in my opinion, no evidence to show that they were dealing with a man whom they did not expect to pay, or, in other words, were running a great risk. I think that at the least they had evidence before them that the man was sub-

stantial to a very large extent, if not worth the money straight away.

In those circumstances the judgment that I shall give will be that 2,360*l.* as advanced by the 16th March is the proper amount and interest at 25 per cent. is the proper interest to allow.

LORD JUSTICE FARWELL: I agree with the LORD CHIEF JUSTICE that the judgment of Mr. Justice COLERIDGE cannot stand. The Act of Parliament has cast upon the Court the necessity, very much against the will of most of the Judges who have had to deal with the matter, of remodelling the terms which were entered into by persons who are *sui juris*, and we have to do the best we can. The Act provides that where there is evidence which satisfies the Court that interest in respect of the actual lending is excessive, and that the transaction is harsh and unconscionable, the Court may reopen the transaction. Now, we have the guidance of the House of Lords in the last case on the subject to tell us that when the Court is dealing with this case of the interest being excessive, and the transaction harsh and unconscionable—the latter part of which means unreasonable, as Lord MACNAGHTEN says, and not in accordance with the ordinary rules of fair dealing—the rate of interest in itself may be sufficient evidence of its being harsh and unconscionable. The Lord Chancellor, Lord LOREBURN, says in so many words at page 467 of 1906 Appeal Cases, "We are asked to say that an excessive rate of interest could not be of itself evidence that it was so. I do not accept that view. Excess of interest or charges may of itself be such evidence, and particularly if it be unexplained. If no justification be established, the presumption hardens into a certainty. It seems to me that the policy of this Act was to enable the Court to prevent oppression, leaving it in the discretion of the Court to weigh each case upon its own merits, and to look behind a class of contract which peculiarly lend themselves to an abuse of power."

The first question, then, is: Is this rate of interest excessive? There again I have the assistance of Lord MACNAGHTEN. He says that if you find the rate of interest is so monstrous that it is impossible to state it to a man of common sense without

producing an exclamation at the inequality of it, that is sufficient to show that the transaction is harsh and unconscionable. It is impossible to say *à priori* what rate of interest is itself so unconscionable, but I am prepared to say this, that 139 per cent., which is the lower rate here, and 218 per cent., which is the higher rate here, and the one which is actually sought to be enforced, is so monstrous as to produce an exclamation from the hearer that it cannot have been actually understood, or cannot have been a fair bargain between the parties. If that is so—and that I take to be the meaning of Lord MACNAGHTEN—then the onus is cast upon the money-lender of explaining.

Now what is the meaning of "excessive"? I take it that we have the explanation in the latter part of sub-sect. (1) of the first section of the Act when the Act goes on to explain what the Court has to do when it re-opens the transaction. It has then to give such sum as is fairly due in respect of such principal, interest, and charges as the Court, having regard to the risk and all circumstances, may adjudge to be reasonable. Reading that back to the word "excessive" before, I apprehend that the meaning is if the rate is in excess of that which is fair having regard to the risk run and to all circumstances of the case. Now test that here. The borrower was a man in receipt of 500*l.* a year salary, and in receipt of 1,200 a year from private sources, and his whole indebtedness was 500*l.* That is the evidence given by the money-lender's agent as the information which he obtained from the borrower, and which he relied upon. It is nowhere suggested that it is not true. The borrower is not asked whether the statements he made were true or not. If the 1,200*l.* a year is taken as a life income it is obvious that with a policy of insurance the borrowing of 2,000*l.* or 3,000*l.* would be a matter of something under 10 per cent.; if, on the other hand, it is meant to represent *corpus* invested at 4 per cent., or 5 per cent., it means a sum very largely in excess of the sum which the money-lenders were going to risk. So far, then, it appears to me to be quite plain that the money-lenders do not discharge the onus which is cast upon them of showing that they were running any risk.

Then in fact I cannot doubt, as was said in the House of Lords in the case of *Samuel* v. *Newbold* (1906 Appeal Cases), that the money-lenders were fully aware of the absence of risk, and that the rate of interest was excessive having regard to the absence of risk. That there is some risk is, of course, always the case. If money is lent on personal security there is always some risk, and, therefore, to some extent that should be allowed for in the rate of interest which the Court does allow having regard to the risk and all the circumstances.

I do not myself attach much importance to the statement by the borrower in the letter that he knew what was to become of the money. In all these cases of money-lenders the borrower always is ready and willing to sign any document which they put before him. It is a circumstance to be considered, no doubt, but if it were conclusive against the borrower that he has written a document to show that he knows, none of these cases would ever come to the Court with any chance of success at all.

I agree with the LORD CHIEF JUSTICE that, comparing the two letters, the letter dictated to and signed by a solvent man whose name appeared to the bill, and the letter which was in fact a printed or typewritten document signed by the other two who were impecunious, and which went into full details, that is a circumstance which gives rise to the very gravest suspicion. The learned Judge has not found as a matter of evidence before him whether Mr. Hazzard or the defendant is to be believed as to the statements which are made as to the rate of interest being disclosed, and so on; but there is this to be said: having arrived at the conclusion that I have, that the onus is on the money-lender; the onus is now on him to prove a full disclosure, and it has not been found that he has done so. The evidence is in direct conflict, and the letters certainly are against the money-lender.

I, therefore, so far as I am concerned, think that he has not discharged the onus of showing that he did make the disclosure This is in itself another circumstance to be considered.

On all these grounds I am of opinion that we are bound by the decision of the House of Lords to say that this is a monstrous rate of interest, that it is harsh and unconscionable, and that it

cannot stand. I confess I should not have been so liberal to the money-lender as the LORD CHIEF JUSTICE. Having regard to the risk and all the circumstances—the risk I have already said in my view would be amply met by 10 per cent., as given in the case that went to the House of Lords, *Samuel* v. *Newbold*, but as my Lord thinks that that 25 per cent. is a fair rate to allow having regard not only to the risk, but to all the circumstances, which I suppose must include the fact that the man was exceedingly foolish to put his hand to such a document, I am not prepared to differ from that, the more so as my difference would have no effect on the result.

Lord Justice KENNEDY: I regret very much that I cannot come to the same conclusion, perhaps because I attach more value than it may be I ought to the findings of fact of a Judge whose law is not impeached. The facts here are found in a succinct form by the learned Judge who heard the evidence; and he has found this distinctly as a fact in the case. "Now I am asked to say on two grounds that the transaction cannot stand because the interest is excessive"—that must be the argument—"that purely by reason of the excess of the interest the transaction is harsh and unconscionable." That must be the argument, as I said, because there is no plea put forward that there was any pressure or duress, or that the principal debtor, or that the surety was placed in any position of stress so as to induce them by such pressure or stress to agree to terms which otherwise they would not have agreed to. Therefore it must come under the head of excessive interest, and so excessive as to make the bargain *ipso facto* by reason of that excessive interest, and that excessive interest only, harsh and unconscionable within the meaning of the Act. At the conclusion, dealing with it as a question of fact he says, "It is a difficult matter to decide, but I have decided it, and, in my opinion, having regard to the circumstances under which this was done, and to the character of the parties, the mode in which it was transacted, and taking all the circumstances into consideration, I cannot hold that the interest, having regard to the amount advanced, was in itself so excessive as to amount to a harsh and unconscionable bargain within the meaning of the Money-lenders Act." He, therefore, decides upon the facts;

and I am not prepared to reverse that decision. He had the law before him, and it is agreed by counsel that he understood the law and expressed it correctly. He held in accordance with that judgment in the House of Lords which was binding on him as upon us.

Before I refer to one or two facts which, as I have the misfortune to differ from my Lord and Lord Justice FARWELL, I am bound to state as shortly as I can, I will say this. It is very clearly laid down by the LORD CHANCELLOR, and by Lord MACNAGHTEN, that excessive interest is not in itself conclusive of the matter, and if there are no circumstances of harshness, duress or unfairness, I find myself, I confess, at present, in his judgment nothing more than what is plain from the Act, namely, that the excess of the interest may be evidence in itself calling for some explanation, and that without that explanation it may be evidence upon which a Judge is justified in dealing with the case as one in which the bargain was harsh and unconscionable. Now "may" means in reason, and in plain reason. It is not "always" but "may" become under certain given circumstances; and you have to apply those circumstances. Where a Judge below has found that those circumstances do not exist, having heard the evidence, and with the documents before him, I shall not overrule, unless of course there has been some obvious mistake, or error of fact, some clearly misunderstood answer, or some wrong hypothesis in fact upon which the Judge, as all Judges may do, has gone wrong in a particular case. That is not suggested here. The law is stated very clearly by the LORD CHANCELLOR at p. 467 of 1906 Appeal Cases. Having found, as the LORD CHANCELLOR says, that the Court is satisfied that the interest is excessive, then the Court has to go on and see "whether in truth and fact, and according to its sense of justice the transaction was harsh and unconscionable. We are asked to say that an excessive rate of interest could not be evidence by itself that it was so. I do not accept that view. Excess of interest or charges may of itself be such evidence, and particularly if it be unexplained." Then he goes on, "If no justification be established, the presumption hardens into a certainty." Then Lord MACNAGHTEN puts it in exactly the same way at p. 469. He says, "It seems

to me there are two cases contemplated by the Act ; one where the interest is excessive and the transaction harsh and unconscionable, the other where the interest is excessive and the transaction is such that, without the necessity of proving the transaction to be harsh and unconscionable—without going into that question at all—a Court of Equity would give relief." And on p. 470 he does not say the rate of interest, if it is monstrous, apart from all the other circumstances is sufficient, but the rate of interest may be so high as to show that by itself.

Now in this case Lord COLERIDGE had before him, to my mind, facts which are very different from those in Alton's case in *Samuel* v. *Newbold*, and one must remember that judgments are given with a view to their facts; and it is impossible to draw any inference with safety by merely knowing that in that case 400 per cent. was found too much, and 100 per cent. odd if the instalment had been duly met, and, therefore, in every case it must be sufficient to prove such a figure. In this case it was an application under Order XIV., and the defendant, who seems to be a gentleman who has acted fairly in this matter, put forward not any suggestion of duress, or any misunderstanding as to interest, but he says that he considers it excessive. He sets out the figures in paragraph 2, "If calculated, I estimate it to be at the rate of 270 per cent. per annum "—there he was very seriously wrong himself—" which I submit is excessive, and that the transaction is harsh and unconscionable." I must say that he knew what the interest was is clear, and I am rather, in that way, in a difficulty. I may be wrong, because stress has been laid upon some difference between the two documents signed. We have before us the promissory note signed by him. The promissory note shows the interest on its face. He signed it with this before him, "3,650*l.* for value received by the following instalments, namely, the sum of 1,825*l.* on 16th June, and the like sum of 1,825*l.* on 16th September, 1907, until the whole sum of 3,650*l.* shall be fully paid, and in case default shall be made in payment of any or either of such instalments the whole sum of 3,650*l.*, or so much thereof as shall then remain unpaid, shall become due and payable." What does it matter what are the documents he had before him ? He signed this note, and he himself

says in his evidence, without objecting to its terms, and he understood it. He says, according to the evidence which appears on the Judge's notes, "I agree to what I wrote; I make no complaint of the terms of the note." That note contained on its face the amount that was to be paid in the event of both instalments being paid, or what would become due if there was default in the first instalment. Therefore, so far from there being any duress, this man, as a gentleman, has stated, "I knew the terms upon which I was giving the promissory note, and obtaining this large sum from the money-lender. I knew it. I signed the document. I understood it and I have no complaint to make of it." Therefore under those circumstances there was nothing that is even suggested now by Mr. Low unfair, although I was surprised to hear him comment on the differences of the two particular papers, the long one and the short one. If the gentleman signs the note with the terms upon the face of it, and says, "I do not complain of those terms," if he has sworn in court, what case can there be that there has been anything with regard to which he did not perfectly understand what he was doing? I must say I do not think that the Act of Parliament has altered that which Sir George Jessel said (*a*), that there is nothing to prevent a man, if he likes, and if he wants to do so, agreeing to pay 100 per cent.; because a man may be a fool if he likes. But what the Act does say is that if the Court finds that the interest is excessive, and that there has been something harsh and unconscionable in the way in which the transaction has come about, or, alternatively, if a case is made out such as would induce a Court of Equity to interfere—in those cases the Court would set aside the bargain and say what shall be done. The House of Lords has decided finally that an excessive interest may—not "shall" but "may"—in certain circumstances be evidence from which the state of things which is meant by the words "harsh and unconscionable" may be treated as proved. But in this case I must say—looking at it, of course, from the findings of the learned Judge whom we are asked to overrule—the money-lenders acted apparently in such a way that Mr. Pawson did understand. Mr. Pawson himself tells us, "I do

(*a*) In *Bennet* v. *Bennet*, 43 L. T. 246, n.

appreciate the terms of the note; I signed it, and I make no complaint," and he never has, as far as that is concerned. He came before the Court saying, "Relieve me from this bargain, with regard to which there was no duress, which I understood at the time—because this is excessive." Now, I am not saying, in a sense, it is not. This gentleman, I will assume, is able to find the 2,000*l.* or more that may be wanted; but you have to look at what he did then. He did not ask, it is true, what the terms were, or the amount that was lent. He says, "I do not complain of the terms of the note," and the other matter is not suggested—there was no fraud or deceit. He neither asked nor cared at the moment. He was getting the advantage to himself of 400*l.* He was getting the old debt of his brother to the money-lender cleared off when his brother could not repay it.

Then it is said, "Oh, but he was a very wealthy man." That is a matter I do not pretend myself to form an independent judgment upon. I should have said that this was not a very good report in itself, though it states, it is true, that this gentleman was possessed of certain means. It also says, "The opinion is that he will prove reasonably safe for any ordinary liability he may enter into, but for any such figure as mentioned" —which must be 4,000*l.* or 5,000*l.*—"adequate and reliable security should be forthcoming"; and it had stated before that while he was thought to be a wealthy man, and had a position in important works, "we are given to understand that he is extravagant in his habits and expenditure, and it is not known what mortgages"—that does not matter—that is another point. It is quite true that he says, and I must take it to be proved, that he stated orally that he had an income from business, and from money of his own; but it is no difficulty to put oneself into the position of the money-lender who was at that time asked to give a loan in favour of this gentleman's brother who could not pay the debt on the existing note, and another gentleman, whose name I need not repeat, but who was believed by him to be a man of little or no means. I am only asked to say, not what I should have done, but whether Lord COLERIDGE had evidence before him on which to act as he did; and as he did apply the law in accordance with the judgment

of the House of Lords, I for myself, with great regret—because I need not say the opinion of my brothers makes me think I must be wrong myself—do not feel myself justified in overruling the judgment of the learned Judge. Undoubtedly what the Act does not do is, it does not intend, to re-enact the Usury Act. It does not intend us to say that a man may not if he likes with his eyes open borrow. And there are the circumstances if one had to refer to them—I think it is only fair to Lord COLERIDGE that I should—that in the case which was before the House of Lords the circumstances were very different as regards the means of the man, because, as stated by the LORD CHANCELLOR, "This report stated that Alton was regarded as a man of respectability and was understood to be a large shareholder in the firm of A. & Company, Limited, brewers, that he was reputed to be well to do, but at times inclined to be slow with his payments. He was, however, the owner of property, and was considered a desirable man to deal with in the ordinary way of business," and, the report added, "It is not thought that any unreasonable risk would be incurred in granting credit to the extent named." Those were the facts in that case. It may be that that very heavy interest was interest which I understand from the judgment, which one must accept, ought to have been treated, and would justly have been treated as it was by the Judge of first instance, Mr. Justice KEKEWICH, and by the Court of Appeal, who affirmed the decision, as sufficient evidence to bring the case within the Act; in other words, as not merely being excessive, but as being harsh and unconscionable. Here it seems to me that Lord COLERIDGE might say, as he does in substance in his judgment, "I cannot find those other facts. The interest is large, excessive if you please, but there is nothing that has been said by the House of Lords which says that I must hold it to be in that case harsh and unconscionable; and I find here facts which are sufficiently explanatory in this, that he, with his eyes open, signed the promissory note which he does not object to; he signed it partly for his own advantage; he signed it without pressure or duress of any kind." Of course, anybody feels tempted to express and act upon the feeling that this is very high interest. If he signed that promissory note knowing what that interest

was, which is apparent upon its face, then it seems to me that in this case, however high the interest may be, it was not interest from which the Judge was bound to find—because that is the only ground upon which you can upset the judgment —that it was itself such that we are bound to find in favour of those who wish to set aside the contract into which this gentleman, a business man, has entered.

Solicitors for defendant: *Beachcroft, Thompson and Co.*
Solicitor for plaintiffs: *Windybank, Samuell and Lawrence.*

APPENDIX H.

DIGEST OF CASES.

WILTON *v.* OSBORNE, [1901] 2 K. B. 110.

[Overruled, *In re a Debtor*, [1903] 1 K. B. 705, *Samuel* v. *Newbold*, [1906] A. C. 461].

Held, by RIDLEY J., that the words, "or otherwise is such that a Court of Equity would give relief," are not exclusive of the words "harsh and unconscionable," and that in order to entitle the person sued to relief the transaction must be such that a Court of Equity would relieve against it.

BARNETT *v.* CORUNNA, *The Times*, 16th June, 1902.

CHANNELL, J., followed the decision in *Wilton* v. *Osborne*.

IN RE A DEBTOR, EX PARTE THE DEBTOR, [1903] 1 K. B. 705.

[See *In re Attree*, [1907] 2 K. B. 868].

Held, by the Court of Appeal, that a transaction with a money-lender can be re-opened when the Court is satisfied that the transaction is "harsh and unconscionable," even though it is not such that a Court of Equity would have given relief before the Act.

Wilton v. *Osborne*, and *Barnett* v. *Corunna*, overruled.

SAMUEL *v.* BURTON, 4th May, 1903.

For the facts of this case see Appendix F, where they will be found fully stated in the judgments.

SAMUEL *v.* MILES, 8th August, 1903.

The defendant borrowed money at a rate of about 55 per cent., and gave no security. It was argued for the defendant that the interest was excessive, and that the transaction was harsh and unconscionable because the money-lender sent a circular to the defendant and tempted him to borrow money.

Held, by DARLING, J., that the rate of interest could not be

said to be excessive, because there was no standard to set up, and that there was nothing harsh or unconscionable in the bargain. The judgment will be found fully reported in Appendix H. to "The Law of Money-lending, Past and Present." The case must be read subject to the later judgments.

LEVENE *v.* GREENWOOD, 20 T. L. R. 389.

[Discussed, *Wells* v. *Joyce*, [1905] 2 Ir. R. 134, and *Carringtons* v. *Smith*, [1906] 1 K. B. 79.]

On 8th January, 1903, the plaintiff gave the defendant 200*l.*, in consideration of which the defendant gave a promissory note for 250*l.*, to be paid by four equal monthly instalments, on the terms that in the event of any one of the instalments not being paid when due, the balance of the whole debt became payable. The defendant also gave the plaintiff a charge on certain freehold property as further security for the loan. The defendant on 14th February paid 50*l.* on account of the instalment then due. On 12th March the plaintiff lent the defendant a further 100*l.*, in consideration of which, and on the plaintiff giving up the first promissory note the defendant gave another note for 375*l.*, repayable by five monthly instalments of 75*l.* each on the same terms as the first note. Payments on account were made at various times, amounting in all to 215*l.* On 20th July there was due in respect of the latter note 160*l.*, and the defendant, in consideration of a further advance of 100*l.* and the surrender of the latter note, gave another note for 315*l.*, payable on the same terms in three monthly instalments. The defendant paid on account two sums of 25*l.* each. On 15th September the defendant, in consideration of the surrender of the last note, gave a new promissory note for 345*l.* on the same terms. No payments were made in respect of this note, and the plaintiff issued a writ on 22nd October. The defendant had received in all 400*l.* from the plaintiff, and had paid 321*l.* 15*s.* in principal and interest. The defendant on 12th March had given the plaintiff a third mortgage on his property, but the Judge found that this security was worthless.

CHANNELL, J., granted relief on the ground that the effect of the "default clause," although well understood by the moneylender, was not properly appreciated by the defendant. He

considered, however, that the 100*l.* paid into Court was not sufficient, and gave judgment for the plaintiff for 265*l.*

WELLS *v.* ALLOTT, [1904] 2 K. B. 842.

[Referred to, *Dott* v. *Bonnard*, 21 T. L. R. 166.

Distinguished and explained, *Lazarus* v. *Smith*, [1908] 2 K. B. 266.]

The claim was by a money-lender upon a promissory note for 70*l.* This note was given in respect of the last of a series of transactions, the net result of which was that the plaintiff had advanced to the defendant at various times sums amounting to 150*l.*, and the defendant had repaid at various times sums amounting to 140*l.* The defendant admitted liability for 10*l.*, and interest at 5 per cent., which amounted to 2*l.* 17*s.* 11*d.* The Master, under Order XIV., made an order for payment of 12*l.* 17*s.* 11*d.* within four days, or in default judgment for that amount, and gave the defendant leave to defend as to the balance.

PHILLIMORE, J., in Chambers, considered that upon the evidence the defendant had no claim for relief under the Act, and gave judgment for the full amount of the claim. The Court of Appeal reversed the order of PHILLIMORE, J., and restored the order of the Master, on the ground that any issue under the Act ought to be dealt with at the trial of the action and not by summary judgment under Order XIV.

PONCIONE *v.* HIGGINS, 21 T. L. R. 11.

The plaintiff gave the defendant, a money-lender, a commission note and undertaking to pay him 5 per cent. if he would procure a loan of 1,000*l.* for her at 5 per cent. upon the security of freehold property. The defendant did this, but the plaintiff never carried the transaction through. In May, 1903, an execution was levied on the plaintiff's goods, and she gave the defendant a bill for 250*l.* in order that he might pay out the execution. To do this he paid 216*l.* 5*s.*, and he charged the plaintiff 20*l.* for discounting the bill and 10*l.* for his charges. The plaintiff also agreed to pay the defendant 100*l.* for services to be rendered in extricating her from her embarrassments. In June, 1903, the plaintiff accepted a bill for 150*l.*, being the 50*l.* due upon the commission note and the 100*l.* for services rendered. Shortly afterwards, being in urgent need of 264*l.*, she

called upon the defendant, who agreed to raise the money if the plaintiff would pay him 50*l.* The plaintiff executed a mortgage of certain property to the defendant for 314*l.* and interest at 20 per cent., and also accepted a bill of exchange for 314*l.* The plaintiff brought this action claiming relief under the Money-lenders Act.

The Court of Appeal, affirming the decision of KEKEWICH, J., refused to interfere so far as the 50*l.* commission and 100*l.* for services rendered were concerned, but held that the charges for the bill of 250*l.* and the 314*l.* transaction were harsh and unconscionable. Relief was granted on a 5 per cent. basis.

WELLS *v.* JOYCE, [1905] 2 Ir. R. 134.

The plaintiff lent the defendant 70*l.*, and received a promissory note for 100*l.*, payable by certain instalments. The 100*l.* was duly paid, and the defendant then applied for a further advance. On 5th September, 1903, the plaintiff lent the defendant 70*l.* upon a promissory note for 100*l.*, payable by five monthly instalments of 5*l.* and the balance of 75*l.* on 10th March, 1904, with the default clause. Four instalments were paid, and on 8th March the defendant asked for a further renewal. On 15th March the plaintiff's solicitor wrote saying that a writ had been issued for 80*l.*, and that unless 30*l.* and 2*l.* 10*s.* were paid he was instructed to proceed to judgment and execution. The defendant paid these sums and signed a new promissory note for 74*l.*, payable by five monthly instalments of 5*l.* and the balance of 49*l.* on 15th October, with the default clause. The defendant paid the first instalment and then made default, and was sued for 69*l.* The defendant had received from the plaintiff 137*l.* (3*l.* having been deducted for expenses) and had repaid him 155*l.*

Lord O'BRIEN, C.J., granted relief and ordered the defendant to pay 40*l.* only in two instalments.

DOTT *v.* BONNARD, 21 T. L. R. 166.

The plaintiff (who for the purpose of the argument was admitted to be a money-lender) lent to the defendant at various times sums amounting to 940*l.*, for which the defendant agreed to pay a cash bonus of 100*l.*, making a debt of 1,040*l.* Upon each advance the defendant gave to the plaintiff

a bonus in the shape of shares in various companies. The shares the plaintiff received amounted at the date of the trial in value to 1,800*l.*, and he also held an undertaking for the delivery of a number of other shares. On 15th November, 1904, the defendant commenced an action against the plaintiff in the Chancery Division, claiming to have the transactions re-opened, and an account taken, and an order for the return of the shares and undertaking. On 17th November the plaintiff served the writ in the present action, claiming payment of 1,040*l.* On an application under Order XIV., the Master made an order that the plaintiff be at liberty to sign judgment unless the defendant paid into Court 1,040*l.* within ten days after the plaintiff should have deposited in Court the certificates for the shares which the defendant had given the plaintiff.

This order was affirmed by JELF, J., but was reversed by the Court of Appeal, who gave the defendant unconditional leave to defend.

CARRINGTONS *v.* VALERIE, 119 L. T. Jo. 62.

On 23rd March, 1904, the plaintiffs advanced 250*l.* to the defendant, a physician and surgeon, on a promissory note for 300*l.*, repayable by three monthly instalments of 20*l.* and the balance of 240*l.* on 23rd July, with the usual default clause. The plaintiffs were aware that Valerie's one-third share of a medical practice was worth from 600*l.* to 700*l.* per annum, and that he also had furniture in his house to the value of about 150*l.* Valerie duly paid off the whole of the 300*l.* by 24th July. On 13th August the plaintiffs advanced a further sum of 125*l.* to the defendant on a promissory note for 150*l.*, payable by three monthly instalments of 10*l.*, and the balance of 120*l.* on 13th December. The defendant duly paid the first instalment, and on 5th October the plaintiffs made a further advance of 200*l.* and cancelled the note and took a fresh promissory note for 500*l.*, payable by five monthly instalments of 50*l.* each and the balance of 250*l.* on 5th April, 1905, with the usual default clause. The defendant duly paid the first instalment of 50*l.* and then made default.

BUCKLEY, J., re-opened the last two transactions, and allowed the defendant to escape on payment of 265*l.* with interest at 20 per cent.

KING *v.* OSBORNE, *The Times*, 22nd May, 1905.

The defendant was a young officer in the army who had incurred considerable liabilities, including a liability to the plaintiff for money borrowed at a high rate of interest. With the assistance of his father money was found to discharge his liabilities, including the plaintiff's promissory note, which was discharged by agreement by the payment of a sum representing principal and interest at the rate of 100 per cent. As part of the scheme for extricating the defendant from his embarrassments, money to the full value of his interest therein was raised upon his interest under his parents' marriage settlement, and the fact that he had no further available property beyond his pay was communicated to the plaintiff. The defendant had promised his father that he would not again have recourse to money-lenders. Almost immediately after payment off of the plaintiff's note, the plaintiff tempted the defendant to borrow again from him at the same high rate of interest as before, and JELF, J., found that the plaintiff had done this relying upon being able in due course, if the loan was not repaid by the defendant, to squeeze a settlement from his father, who, he thought, would pay rather than suffer his son's conduct to be exposed. Relief was granted.

SAMUEL *v.* ELLIOTT, 2nd December, 1905.

In this case, which was heard before CHANNELL, J., the default clause was relied upon by the defendant as a ground of relief, but the learned Judge found as a fact that the borrower sufficiently understood the nature and effect of the clause, although he had not made any calculation as to the precise effect of it upon the rate of interest payable for the loan in the event of its coming into operation, and relief was accordingly refused.

CARRINGTONS *v.* SMITH, [1906] 1 K. B. 79.

[See *Samuel* v. *Newbold*, [1906] A. C. 461, and *Fieldings* v. *Pawson*, Appendix G.]

This action was brought to recover 62*l.* 10*s.*, being the balance due under a promissory note for 150*l.* dated 31st December, 1904, made by the defendant, and payable by monthly instalments of 12*l.* 10*s.*, with the usual default clause. The

defendant paid seven instalments and then made default. The defendant had an income of about 1,000*l.* a year and possessed furniture and pictures of considerable value. The plaintiffs obtained no security for the loan, but were informed at the time by the defendant of his financial position. The interest on the loan worked out at 75 per cent.

Held, by CHANNELL, J., that the fact that the rate of interest was high did not of itself necessarily render the transaction "harsh and unconscionable," and that, having regard to the risk and all the circumstances of the case, amongst which was the fact that the defendant understood the transaction, and voluntarily agreed to pay the interest demanded, the rate of interest was not excessive and the transaction was not harsh and unconscionable.

[This case must be read subject to the judgments in *Samuel* v. *Newbold*, *Fieldings* v. *Pawson*, and *Blair* v. *Buckworth*.]

SAMUEL *v.* BELL, 22 T. L. R. 118.

The defendant applied to the plaintiff by letter for a loan. The plaintiff wrote in reply mentioning his terms, but the defendant declined the offer on the ground that the interest was too high. The plaintiff then sent by post to the defendant 200*l.* in Bank of England notes with a promissory note for 300*l.*, payable by twelve monthly instalments, with a default clause. The defendant paid five instalments, and then made default and was served with a writ. The defendant with great difficulty raised the money and paid the plaintiff the balance due and the costs of the writ. Within a week after this the plaintiff's agent called upon the defendant and tempted him again to borrow 200*l.* on the same terms as before. This the defendant did, and made default in the fourth instalment. The defendant was sued, and claimed relief against both transactions.

CHANNELL, J., re-opened both transactions and directed an account to be taken on a 20 per cent. basis. One point of great importance decided in this case was that payment made by a borrower in default, under pressure of a writ, does not disentitle him to relief in respect of such payment.

MAGAZINER *v.* SAMUEL, 120 L. T. Jo., 152.

The defendants (a firm of money-lenders) had recovered judgment against the plaintiff in the King's Bench Division. An application was made at Chambers and the judgment was set aside sufficiently to enable the borrower to set up the Act. In August, 1905, the plaintiff commenced this action in the Chancery Division, claiming that the whole of his transactions with the defendants were illegal and void, or alternatively that the transactions might be re-opened. The King's Bench action was likely to be tried shortly, and the defendants took out a summons asking that the Chancery action might be stayed.

It was held by JOYCE, J., that the action must be stayed until after the hearing of the King's Bench action, the money-lenders admitting that in the latter action all the transactions might be gone into.

STRICHAND *v.* LACON, 22 T. L. R. 245.

This was an action by a firm of money-lenders carryingon business at Poona, in India, to recover 236*l.* 6*s.* 6*d.*, the balance of principal and interest claimed under a document dated 24th October, 1904. The defendant paid into Court the principal together with interest at the rate of 24 per cent., and claimed relief under the Act.

It was held by RIDLEY, J., that the Act did not apply to a contract made in India and intended, at the time when it was made, to be performed there.

PART *v.* BOND, before JOYCE, J., 93 L. T. 49; before the Court of Appeal, 94 L. T. 390.

[Decision of JOYCE, J., discussed by CHANNELL, J., in *Carrington* v. *Smith*, [1906] 1 K. B. 79.]

The plaintiff, Mrs. Part, brought this action against the defendants to obtain relief in respect of a loan transaction entered into by the plaintiff in June, 1903, with the defendants. The defendants lent the plaintiff 1,000*l.* for a period of six months, secured upon a second mortgage of the whole of her life interest in certain settlements, bearing interest at the rate of 45 per cent.

JOYCE, J., re-opened the transaction and awarded the

defendants interest at the rate of 10 per cent. This decision was affirmed by the Court of Appeal, ROMER, L. J., saying that the lady had borrowed the money because she was a foolish woman, in weak health, acting under the influence of a knavish adviser. He inferred from the circumstances and evidence that the defendants must also have surmised that there was some weakness or folly on the part of the lady, or some knavery on the part of her adviser, or they would never have ventured to ask for interest at so high a rate on such a security.

LITCHFIELD *v.* DREYFUS, [1906] 1 K. B. 584.

The plaintiff carried on business as an art dealer for many years before 1903, and in the course of his business he gave long credit and took from his customers bills in payment of the amounts they owed to him for their purchases, and he discounted and renewed the bills from time to time. In 1903 he retired from the business and sold his stock by auction, and took bills for the greater part of the purchase-moneys, which he discounted and renewed from time to time. After his retirement he carried on business as an expert art valuer and adviser, and he also assisted two art businesses, in which he was largely interested, by discounting bills for them and by taking bills for interest due to him on debentures. He also assisted, with loans and by discounting bills, about ten persons with whom he had been connected in business. The defendant alleged that the plaintiff was an unregistered money-lender.

Held, by FARWELL, J., that the plaintiff was not, and never had been, a money-lender, and that he came within the exception in sect. 6, sub-sect. (d).

LAZARUS *v.* CRISP, *The Times*, 26th March, 1906.

This action was brought to recover 135*l.*, the balance due on a promissory note for 145*l.*, dated 24th November, 1905, payable by four monthly instalments of 10*l.*, commencing January, 1906, and the balance in May, 1906, with the usual default clause. The defendant had made default in paying the second instalment. From his evidence it appeared that he was twenty-seven years old, and required the money because he was in temporary need of money owing to his father's sudden death.

He was entitled to a share in his father's property. He explained to the plaintiff his position, and made a declaration in which he stated that he understood the effect of the default clause.

DARLING, J., said that if the defendant, being in possession of his wits, and knowing his own affairs, necessities, and resources much better than they could, agreed that it was worth his while to pay 100 per cent. for six months, how could he (the Judge) come to the conclusion that the rate of interest was excessive? Relief was refused.

[*Semble.* This case should be read in the light of the later decisions.]

BONNARD *v.* DOTT, before KEKEWICH, J., 92 L. T. 822; before the Court of Appeal, [1906] 1 Ch. 740.

The plaintiff borrowed from the defendant at various times sums amounting to 940*l.* In respect of these loans he gave the defendant promissory notes, and on 16th June, 1904, gave him two promissory notes for 840*l.* and 200*l.*, the additional 100*l.* representing a cash bonus which the plaintiff agreed to give to the defendant. The plaintiff also gave to the defendant by way of bonus or cash consideration for renewals 4,800 shares in certain companies and an undertaking to deliver 4,800 shares in another company. The plaintiff alleged that these shares were worth at least 5,000*l.*, but the defendant said that at the time when he received them they were practically worthless. The plaintiff claimed that these transactions might be re-opened, and that he might be relieved from payment of any sum in excess of that adjudged to be fair, and he also claimed a return of the shares and undertaking. The defendant denied that he was a money-lender or that the transactions were harsh or unconscionable, and he counter-claimed for specific performance of the plaintiff's undertaking to deliver the shares. The plaintiff in reply pleaded that inasmuch as the defendant was an unregistered money-lender, all the money-lending transactions were illegal and void. The defendant asserted that he only lent money to company promoters, and that all his money-lending transactions were incidental to his share speculations.

KEKEWICH, J., held that the defendant was a money-lender

and that the transactions were harsh and unconscionable, and granted relief on a basis of 20 per cent. He expressed no opinion on the point whether the transactions were illegal and void. The defendant did not appeal on the question whether he was a money-lender or not, but appealed on the ground that the transactions were not harsh and unconscionable. Before the appeal was heard the case of *Victorian Daylesford Syndicate* v. *Dott* (*infra*) came before BUCKLEY, J., who held that the defendant being an unregistered money-lender, all his money-lending transactions were illegal and void. The Court of Appeal approved this decision, and without going into the merits of the case dismissed the appeal upon that ground.

VICTORIAN DAYLESFORD SYNDICATE, LD. *v.* DOTT, before BUCKLEY, J., [1905] 2 Ch. 624; before the Court of Appeal, [1906] 1 Ch. 747.

Held, by BUCKLEY, J., and the Court of Appeal, that sect. 2, sub-sect. (1) (c) of the Act applies to a money-lender who has not registered, and accordingly he cannot make any valid "agreement in the course of his business as a money-lender with respect to the advance and repayment of money, or take any security for money in the course of his business as a money-lender."

IN RE A SOLICITOR, *The Times*, 9th May, 1906.

A money-lender (*a*) was charged with and pleaded guilty to carrying on business as a money-lender in the name of limited companies. The position alleged was that the defendant traded at five different addresses, companies being formed to conceal his name. The King's Bench Divisional Court suspended for three years a solicitor who had been intimately connected with the money-lender, not on the ground that he had taken part in the formation of these companies, or because he had professionally advised the money-lender, but because of the part he had taken in the defendant's business. The committee of the Law Society found that one of the objects of the trading under separate names was that a borrower who had got into difficulties with one of the companies should be handed on to

(*a*) *R.* v. *L.*, *The Times*, 5th July, 1905, and 18th July, 1905.

another, for the purpose of making a fresh bargain with the latter which would increase the amount of his indebtedness. It was also found that the solicitor was aware of this and aided and abetted the money-lender.

RECHNITZER *v.* SAMUEL, 95 L. T. 75.

On 26th March, 1906, a firm of money-lenders issued a writ against Rechnitzer in the King's Bench Division to recover 450*l.* due upon a promissory note. On 2nd April Rechnitzer issued the writ in this action in the Chancery Division against the money-lenders, claiming that the various transactions between himself and the defendants (with one of which the King's Bench action dealt) should be re-opened. The defendants moved before BUCKLEY, J., to dismiss the Chancery action as an abuse of the process of the Court.

BUCKLEY, J., said that although the King's Bench action was commenced first, yet the Chancery Division had the better machinery for taking accounts, and it was preferable to allow that action to go on in which the burden of proof rested on the plaintiff. Both actions, therefore, must go on unless the King's Bench Division stayed or transferred their action. When this case was taken to the Court of Appeal it was pointed out that Rechnitzer had consented to an order in the King's Bench Division on 25th April directing the action to be set down for trial forthwith before a judge in Middlesex. The Court on that account stayed the action in the Chancery Division, but gave the borrower leave to raise by counterclaim the issues raised in the action in the Chancery Division.

SAMUEL *v.* NEWBOLD, before KEKEWICH, J., *sub nom. Saunders* v. *Newbold*, 20 T. L. R. 620; before the Court of Appeal, *sub nom. Saunders* v. *Newbold*, [1905] 1 Ch. 260; before the House of Lords, [1906] A. C. 461.

In 1903 Alton was introduced to the plaintiffs, a firm of money-lenders, by Sagar, and Alton borrowed from them 1,000*l.* on terms of repaying 1,400*l.* by five monthly instalments of 250*l.* and the balance of 150*l.* on 6th January, 1904, with the usual default clause. This transaction was ultimately settled. In September, 1903, Sagar again procured an application by Alton to the plaintiffs for a loan. Alton borrowed 2,000*l.*,

and gave the plaintiffs a promissory note dated 3rd October, 1903, for 3,300*l.* payable by twelve monthly instalments of 275*l.*, with the default clause. If the instalments were punctually paid the rate of interest was 104 per cent. Before advancing the 2,000*l.* the plaintiffs obtained a report from a financial agency from which it was clear that very little risk would be incurred by lending him 2,000*l.* Sagar had for years done business with the plaintiffs, and was a co-adventurer with them to the extent of 500*l.* in the October transaction. He also received a commission from Alton, and the LORD CHANCELLOR stated that there was ample evidence that the plaintiffs were aware of this. Owing to his intemperate habits Alton was a man liable to be imposed upon, but the plaintiffs were not aware of this. Alton died on 18th November, 1903, and this action was commenced against his executor. Alton's net estate was over 40,000*l.*

The action was tried before KEKEWICH, J., who held that the transaction was harsh and unconscionable, and that the previous 1,000*l.* loan transaction must also be re-opened. Judgment was accordingly given entitling the plaintiffs to repayment only of the sums actually advanced to Alton, together with interest at the rate of 10 per cent. The Court of Appeal affirmed the judgment of KEKEWICH, J., so far as the 2,000*l.* transaction was concerned, but reversed so much of it as concerned the closed 1,000*l.* transaction, on the ground that no case for such relief had been raised by the defendant, though without prejudice to his right to bring an action to re-open that transaction. The House of Lords affirmed the decision of the Court of Appeal.

DOTT *v.* BRICKWELL, 23 T. L. R. 61.

This action was brought for a declaration that two sums of 200*l.* and 50*l.* had been obtained from the plaintiff by the defendant's fraudulent representations, and to recover these sums with interest. The plaintiff was an unregistered money-lender, and this was set up as a defence as far as the 50*l.* was concerned.

SWINFEN EADY, J., held that as the plaintiff was not suing on any contract this defence was of no avail.

LODGE *v.* THE NATIONAL UNION INVESTMENT COMPANY, LD., [1907] 1 Ch. 300.

[Distinguished, *Chapman* v. *Michaelson*, 24 T. L. R. 795.]

The defendants were unregistered money-lenders who had advanced money to the plaintiff upon various securities. The plaintiff commenced this action on 23rd May, 1906, and said that the defendants not being registered the whole of the contracts and dealings between them were illegal and void. He claimed a declaration to that effect, delivery up of the assignments and securities held by the defendants, and repayment of the sum which he had paid for renewing certain bills. The only question was whether he was entitled to the relief claimed without repaying any of the money which had been advanced to him.

PARKER, J., decided that this being an equitable action, the defendants could only be ordered to give up the securities upon the terms that the plaintiff should repay the money which had been advanced to him.

FURBER *v.* FIELDINGS, 23 T. L. R. 362.

This was an interpleader issue between the plaintiff, who was the holder of a bill of sale, and the defendants, who were execution creditors. The defendants alleged that the bill of sale was bad because the plaintiff was a money-lender who was not duly registered. It appeared from the evidence of the plaintiff that the business of his firm was that of auctioneers, estate agents, and valuers. They advanced money upon bills of sale in order to obtain the valuation fee, and their regular rate was 15 per cent. They did not advertise or lend money on personal security.

PHILLIMORE, J., held that the plaintiff was within the second part of the exception referred to in sect. 6 (d), as carrying on a business in the course and for the purpose of which he lent money, and that consequently he was under no obligation to register himself as a money-lender. The learned Judge added (and this does not appear in *The Times* Law Reports, but is taken from the shorthand note of the judgment), "I may further add that the point taken on the decision of PARKER, J. (*a*), and really apart from that decision, is a good one. It is said that the

(*a*) That is, the decision in *Lodge* v. *The National Union Investment Company*.

contract made by an unregistered money-lender is bad, and the property which, upon a document which *primâ facie* is correct and complete and satisfactory and sufficient to pass the title, passes is not to be said by third parties not to have passed because a third party can prove, and is permitted to prove, that the grantee of that property was, as between himself and the grantor, not entitled to receive it: the grantor had granted the property to the grantee, it may be in virtue of any number of illegal assignments, and it may be in the sense he could recover it back, but nevertheless against all the rest of the world the grantee is entitled to hold the property, and that is a point which goes beyond what PARKER, J., decided, though the point which PARKER, J., decided would be sufficient in this case, namely, that the man who seeks to recover that property, and who appealed to the equitable provisions of the Money-lenders Act, must do equity: he must therefore offer to replace the grantee of the property in the position in which he was before the illegal contract was entered into."

BURTON *v.* THE COMPANIES REGISTRATION AGENCY, before BUCKNILL, J., 23 T. L. R. 151; before the Court of Appeal, 23 T. L. R. 337.

[Followed, *Samuel* v. *Pazolt*, 23 T. L. R. 622.]

The validity of a bill of sale was the chief point in this case, but the following questions also arose: (1) Were the defendants money-lenders within the meaning of the Act? (2) Were the interest and certain charges excessive? (3) Were the transactions harsh and unconscionable? It was contended by the defendants that the two latter questions were for the Judge and not for the jury, but BUCKNILL, J., decided to leave the questions to the jury. He thought that it was for the Judge to determine whether there was a case to go to the jury that the transactions were harsh and unconscionable, and it was for the jury to say whether they were so in fact. This case went to the Court of Appeal, which expressed no opinion upon the course adopted by the Judge in leaving these questions to the jury.

LEVENE *v.* TITCHENER, 23 T. L. R. 508.

The plaintiff lent the defendant 50*l.*, and received a promissory note for 70*l.*, dated 14th December, 1906, payable by

twenty-two weekly instalments of 3*l.* each, and the balance of 4*l.* on 24th May, 1907. The note contained the usual default clause. Default was made in payment of the seventh and eighth instalments.

CHANNELL, J., re-opened the transaction, chiefly on the ground that the effect of the default clause was that the interest might turn out to be very excessive, and this was not understood. He gave judgment for the plaintiff for 35*l.*

OAKES *v.* GREEN, 23 T. L. R. 560.

The defendant had lent 300*l.* to the plaintiff upon the security of a bill of sale. The rate of interest was 40 per cent. This action was brought for a declaration that the bill of sale was void. CHANNELL, J., having decided against this contention, the plaintiff applied for relief under the Act, but the Judge refused to interfere.

PALL MALL BANK *v.* WARD, *The Times*, 17th May, 1907.

There had been transactions between the plaintiffs and defendants which had been closed. The plaintiffs then lent the defendants sums amounting to 170*l.* On 14th August, 1905, the position was that the defendants owed the plaintiffs 34*l.* for principal and 93*l.* for interest. These debts were merged in a promissory note for 300*l.* payable by monthly instalments of 10*l.*, with a default clause. 100*l.* had been repaid, and then default was made. The plaintiffs had thus advanced 170*l.* and had received 236*l.* and claimed a further 200*l.*

BIGHAM, J., re-opened the transaction because the plaintiffs had lent on previous transactions at 60 per cent., and had been paid. They ought, therefore, to have known that the defendants were people from whom money could be got, and the rate of interest was excessive.

SAMUEL *v.* PAZOLT, 23 T. L. R. 622.

RIDLEY, J., followed the case of *Burton* v. *Companies Registration Agency*, and left to the jury the questions whether the rate of interest was excessive, and whether the transaction was harsh and unconscionable.

WADE *v.* SHAFFER, *The Times*, 25th June, 1907.

The plaintiff was a music-hall artiste well known to be in receipt of a large income. He brought this action against the defendants, claiming that his money-lending transactions with them might be re-opened. On 7th January, 1907, he signed a promissory note for 500*l.* payable by monthly instalments of 100*l.* The sum actually advanced was 320*l.* The February instalment was paid.

PARKER, J., said that *Samuel* v. *Newbold* had decided that if the Court thought the interest was excessive, the onus lay on the money-lender to prove that the transaction was not harsh and unconscionable. He ordered the promissory note to be given up upon the plaintiff paying the sum which had been actually advanced, with interest at 25 per cent.

IN RE ATTREE, EX PARTE WARD, [1907] 2 K. B. 868.

The bankrupt, Attree, had had money-lending transactions with one Pockett, and had delivered to him by way of security 100 shares of 10*l.* each in a certain company. Pockett lodged a proof of debt for 1,250*l.* for money lent, and valued his security at 100*l.* The proof was admitted for voting purposes, but Pockett's solicitor did not vote upon it, and said the security would probably be re-valued. On 5th November, 1906, Pockett's solicitor gave notice to that effect to the trustee. On 7th November, the trustee wrote requiring Pockett to give up his security for 120*l.* On 29th November Pockett's solicitor wrote withdrawing his proof. The trustee then moved before the County Court Judge that Pockett should deliver up the security, and for an account and relief under the Money-lenders Act. It was successfully urged by Pockett that, as there was no proof by the money-lender before the Court, no order could be made. This decision was affirmed by BIGHAM and SUTTON, JJ.

THE STAFFORDSHIRE FINANCIAL COMPANY *v.* HUNT, [1907] W. N. 258.

[Referred to, *In re a Debtor, Ex parte Carden*, 52 Sol. Jo. 209; *King* v. *Turnbull*, 24 T. L. R. 434.]

The defendant in January, 1906, applied for a loan to one Lester, who had an address in London, and he agreed to pay

Lester a commission of 2½ per cent. on all loans procured by him. Lester introduced the defendant to the plaintiffs, who were money-lenders with a registered address at Walsall. They advanced 550*l.* to the defendant on a promissory note payable in three months at Lester's office. The rate of interest was 25 per cent. The money was handed to the defendant by Lester. The note was renewed three times, and each time was sent from Walsall to Lester, who obtained the defendant's signature. It appeared from the evidence that Lester had done business with the plaintiffs for nine years, but never received a commission from them. When he introduced a case the money was actually handed over at his office and promissory notes were made payable there. Lester was a money-lender on his own account and also introduced business to other money-lenders. The question whether an advance should be made by the plaintiffs was decided at Walsall.

A. T. LAWRENCE, J., held that the plaintiffs carried on business at Lester's address, and, as they were not registered there, the note sued on was void under sect. 2, sub-sect. (1) (b) of the Act.

IN RE A DEBTOR, EX PARTE CARDEN, 52 Sol. Jo. 209.

[Referred to, *King* v. *Turnbull*, 24 T. L. R. 434; *Blair* v. v. *Buckworth*, 24 T. L. R. 474.]

The debtor having applied to one S. for a loan, was referred to one W., whom the debtor interviewed at a solicitor's office. W. tendered to the debtor a bill for 250*l.* payable at offices in London Wall. No drawer's name appeared on the bill. The debtor accepted the bill but failed to meet it at maturity, and on 3rd August 1907, was served with a writ at the suit of Mrs. Carden, who was a money-lender registered at Kensington. W. now appeared as the drawer of the bill and Mrs. Carden as indorsee. The debtor had never heard of Mrs. Carden before. Judgment went by default, and a bankruptcy petition was presented against the debtor. Evidence was given before the Registrar, who dismissed the petition.

His decision was affirmed by the Court of Appeal on the ground that the transaction was bad under sect. 2, sub-sect. (1) (c), of the Act. BUCKLEY, L.J., was also of opinion that it was bad under sect. 2, sub-sect. (1) (b), and COZENS-HARDY, M.R.,

appears to have been of the same opinion, although he thought it simpler to decide that the case came under (c).

ELDRIDGE *v.* BROSSARD, *The Times*, 27th January, 1908.

The defendant had had three transactions with the plaintiffs, in which he had received 128*l.* and had already repaid 178*l.* 10*s.*

DARLING, J., held that the plaintiffs had received sufficient, and gave judgment for the defendant. In the course of his judgment he said : "It was not for him to legislate or attempt to influence the Legislature, and he was only speaking his own mind, but he could not help thinking it would be well if the Legislature could give some further guidance to the Judges by fixing a maximum rate of interest that should be charged. Many people who borrow never realised how much they were being charged, and if it were laid down by law that the interest charged should be plainly shown on the promissory note, many who now borrow would never do so."

FIELDINGS *v.* PAWSON, before COLERIDGE, J., [1907] W. N. 231 ; before the Court of Appeal, Appendix G.

The plaintiffs advanced 2,360*l.* to W. H. Pawson, out of which he repaid 373*l.* to the plaintiffs which was due on a former transaction. A joint and several promissory note, dated 16th March, 1907, was signed by W. H. Pawson, his brother J. J. Pawson, and Gerard O'Shea, for 3,650*l.*, payable by two instalments of 1,825*l.* on 16th June and 16th September respectively, with the default clause. J. J. Pawson agreed to sign the note if O'Shea would sign as well, and he was interested in the transaction to the extent of 400*l.*, which his brother owed him and repaid out of the loan. Default was made in the payment of the first instalment, and this action was commenced. W. H. Pawson and O'Shea did not appear. It was stated that the defendant J. J. Pawson had an income of about 1,200*l.* a year, but it did not appear in evidence that this was derived from a source which would be available to a creditor. The rate of interest was 139 per cent. if the instalments were punctually paid, and 218 per cent. if the default clause came into operation.

COLERIDGE, J., gave judgment for the plaintiff for the full amount, but his decision was reversed by the Court of Appeal. The rate of interest was reduced to 25 per cent.

KING *v.* TURNBULL, 24 T. L. R. 434.

This was an action to recover the balance due upon a promissory note. The principal defence urged was that the transaction was void, as it had not been carried out at the plaintiff's registered address. It appeared that the advance was made at a restaurant in Bishopsgate Street, and the defendant there gave a promissory note which provided for payment being made at the plaintiff's registered address. The plaintiff admitted that he had sometimes, but not very often, arranged loans away from his registered address.

LAWRANCE, J., overruled the contentions for the defence, and gave judgment for the plaintiff.

BLAIR *v.* BUCKWORTH, 24 T. L. R. 474.

The defendant was the owner of large estates, and was also interested in certain gold mines in Siberia, and in December, 1906, it became necessary for him to go to Russia at short notice and to take with him 7,500*l.* He was introduced by a solicitor to the plaintiff (a money-lender whose registered address was 215, Piccadilly), who lent him 7,560*l.* The defendant gave the plaintiff an equitable mortgage upon certain of his estates to secure 8,400*l.* and interest at the rate of 6 per cent. He also gave a promissory note for 8,400*l.* payable in three months at 215, Piccadilly. The transaction was carried out at the solicitor's office. The promissory note was not paid when due, and this action was commenced. The defendant before action tendered 7,560*l.* and interest at the rate of 10 per cent. for three months and at the rate of 6 per cent. afterwards. The defendant contended that the transaction was harsh and unconscionable, and also that it was not carried out at the money-lender's registered address, and was therefore void.

CHANNELL, J., gave judgment for the plaintiff, but his decision was reversed by the Court of Appeal. The sum tendered by the defendant was considered sufficient, having regard to the fact that the money-lender held security. The point as to whether the transaction was void under sect. 2, sub-sect. (1)(b) was left open.

LAZARUS *v.* SMITH, [1908] 2 K. B. 266.

In February, 1907, the defendant borrowed 250*l.* from the plaintiff, and gave him a promissory note for 350*l.* payable by

five monthly instalments of 20*l.* and the balance of 250*l.* on 3rd August, 1907. The first five instalments were paid, but the 250*l.* was not paid and the promissory note was renewed. In February, 1908, the defendant gave the plaintiff a promissory note for 295*l.*, which was the note sued on in the action. In consideration of renewals the defendant had paid the plaintiff 110*l.* in addition to the 100*l.* already mentioned. On an application for summary judgment under Order XIV. the Master gave judgment for 40*l.*, and gave defendant leave to defend as to the balance. This order was affirmed by RIDLEY, J., in Chambers, and by the Court of Appeal.

KIRKWOOD *v.* OSTWIND, 16th May, 1908.

The plaintiff, a money-lender, had a registered address at Ipswich, where his Ipswich business was conducted by a manager. An agent of the plaintiff called upon the defendants at their shop in London and procured them to sign an application to plaintiff for a loan, which the agent then sent by post to the plaintiff at Ipswich. Plaintiff's manager then wrote to defendants from Ipswich, the letter paper bearing the registered address printed at its head, making an appointment to call upon the defendants. The manager called next day, pursuant to the appointment, upon defendants at their shop. The transaction was then and there completed. The money was paid to the defendants, and the defendants signed a promissory note which was made payable to plaintiff at his registered address at Ipswich.

GRANTHAM, J., held that there had not been any such violation of the provisions of the Act as to invalidate the transaction.

KING *v.* MASSEY, 24 T. L. R. 710.

The defendant wrote to the plaintiff at his registered address and expressed his willingness to borrow 100*l.* or 200*l.* The plaintiff then called on the defendant at his office and advanced him 100*l.*, taking a promissory note for 140*l.* payable by four equal quarterly instalments, with the default clause. Default was made and this action was commenced. The defendant contended that the transaction was harsh and unconscionable, and also that the transaction, not having been carried out at the plaintiff's registered address, was void under sect. 2, subsect. (1) (b). DARLING, J., gave judgment for the plaintiff.

CHAPMAN *v.* MICHAELSON, 24 T. L. R. 795.

The plaintiff was the trustee of one Loyd under a scheme of arrangement with his creditors. The defendant was a money-lender, and on 14th February, 1905, he lent Loyd 2,000*l.* on the security of a mortgage. The mortgage was taken by the defendant in the course of his business as a money-lender, but not in his registered name. The action was brought for a declaration that the money-lending transaction was void. The defendant counter-claimed for a declaration that the scheme of arrangement constituted a trust in his favour, and that in administering the scheme the plaintiff was bound to recognise his right to receive his principal and interest (which amounted to 6,347*l.*). It was contended on behalf of the defendant that the plaintiff was not entitled to the declaration claimed, and that if he was entitled to a declaration at all, he was asking for equitable relief and ought at least to be put upon the terms of repaying the money actually advanced.

EVE, J., made the declaration asked for without imposing any terms, and dismissed the defendant's counter-claim.

APPENDIX I.

NOTES ON THE LEGAL CONTRACT OF LOAN OF MONEY (FOR UNPROFESSIONAL READERS).

INTEREST.—Unless stipulated for, or payable by some known usage or custom of trade, as in the case of advances by bankers to their customers, or to be inferred from the course of dealing between the parties, interest is not payable upon money lent.

By 3 & 4 Will. IV. c. 42, "Upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest (*a*) from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law." This statute, however, has no special relation to loans of money, but applies to them equally with tradesmen's bills and other liquidated demands. There is a great distinction between interest payable by contract and interest recoverable under the statute, for the latter is recoverable only as damages; consequently it can be recovered only in an action for the principal, whereas, in the case of interest payable by contract, it may become a debt recoverable with or without the principal debt. Accordingly, in the case of agreed interest,

(*a*) At the date of this statute the usury laws were in force. The current rate was 5*l.* per cent. per annum. The repeal of the usury laws has not affected this statute.

actions may be brought from time to time for interest in arrear without the principal being sued for. Interest under the statute is not a matter of right, but a discretionary power to be exercised by the jury, who need not give interest at any particular rate, or indeed at all, unless they think fit to do so. Contract interest is, or may be, treated as an accretion to the original debt, but interest recoverable under the statute cannot be so treated, at any rate until judgment has been obtained for it.

Compound interest may be stipulated for, or it may be chargeable by the custom or usage of trade, as by bankers, or under a course of business established between the parties, as where an agent has been in the habit of delivering accounts made out with yearly or half-yearly rests, with the addition of interest at each rest, and the accounts have been settled by the principal upon that footing.

Interest payable upon money payable abroad is, in the absence of stipulation, payable according to the rate which is current at the place of payment.

Instalments—Default Clause.—A clause commonly called "The Default Clause" is generally contained in promissory notes given to money-lenders for payment by instalments. It provides that upon default in payment of any instalment the balance remaining unpaid upon the note is to become at once due and payable. This clause is discussed in relation to the Money-lenders Act, *ante*, p. 52.

In the absence of such a clause the creditor is not entitled, upon his debtor making default, to claim the balance remaining unpaid as a liquidated debt. If, however, the debtor repudiates the whole transaction by announcing in plain terms that he does not intend to make any more payments or in any other manner sufficiently manifests an intention not to be bound by the contract, the creditor may, if so minded, at once sue him for any instalments which are overdue, and for damages for breach of contract, in which case the measure of damages will be the amount outstanding, subject to such rebate in respect of the agreed date of payment being anticipated as the jury may think proper to allow. The creditor need not, however, take this course. He may treat the con-

tract as subsisting and may sue from time to time for the instalments as they become due.

INTEREST AFTER JUDGMENT.—Interest runs upon a judgment at 4 per cent. It is, however, competent to the parties to stipulate for interest to run after judgment, upon such judgment at a higher rate, and such a stipulation may be given effect to; but it must be stipulated for in clear terms, otherwise the debt will be regarded as merged in the judgment, and interest upon the judgment at 4 per cent. will alone be payable.

LOANS TO INFANTS.—See the Infants' Relief Act, 1874, and the Betting and Loans (Infants) Act, 1892, in Appendix B. Monies advanced to infants who are in need of "necessaries" may be recovered, notwithstanding the Infants' Relief Act, if the lender can prove that the infant was "necessitous" and that the money advanced was actually expended upon "necessaries." But this subject belongs to the subject "Infancy."

LOANS TO MARRIED WOMEN.—If a married woman is so circumstanced with regard to her husband that she is in a position to pledge his credit for "necessaries," advances made to a "necessitous" wife, which are actually expended by her upon "necessaries," are recoverable from her husband. But this subject belongs to the subject "Married Women."

LOANS TO LUNATICS are valid unless the fact of lunacy was known to the lender.

LOANS TO CORPORATIONS AND COMPANIES.—Different kinds of corporations and companies have different borrowing powers. In all cases the lender should satisfy himself that the borrowing corporation or company has, legally, power to borrow and to give the agreed security, and also that the persons who execute on behalf of the corporation or company the agreed documents, have authority to bind the corporation or company by their acts.

SPECIFIC PERFORMANCE is a remedy which is not available. Neither a man who has agreed to lend money, nor a man who has agreed to borrow money, can be compelled specifically to perform his contract. An agreement to take debentures from the issuing company is an agreement to lend money.

DAMAGES.—A man who contracts to lend a definite sum of money to another for a certain time on certain terms may be sued for damages for breach of his contract. So also may a man who has agreed to borrow a certain sum of money for a certain time on certain terms. In an action by contracting borrower against contracting lender the measure of damage would in most cases be the difference between the sum which the borrower would have had to pay to the lender for interest if the contract had been carried out, and the interest which the borrower had to pay for the accommodation elsewhere, he having done his best to obtain the money elsewhere on terms equally advantageous with the contract terms. Conversely, in an action by contracting lender against contracting borrower, the measure of damages would ordinarily be the difference between the interest which the borrower agreed to pay and the interest which the lender was able to obtain for the stipulated period, he having used his best endeavours to invest his money on terms equally advantageous with the contract terms. Any damages beyond these would be only recoverable under very special circumstances. Where a loan, if made, would have been repayable on demand, no damage under ordinary circumstances would be recoverable for the breach of contract to lend or to borrow as the case might be.

I.O.U.—A mere I.O.U. containing nothing more than an acknowledgment of indebtedness in a specific sum is admissible in evidence without a stamp. If it contains anything more it may require to be stamped either as a promissory note or as an agreement.

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